





A
PRACTICAL

TREATISE OF POWERS;

BY

THE RIGHT HON. SIR EDWARD SUGDEN.

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A

TREATISE OF POWERS.

CHAPTER VIII.

OF THE EFFECT OF THE CREATION AND EXECUTION OF POWERS.

SECTION I.

OF THE EFFECT OF THE CREATION OF POWERS.

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|--|---|
| 1. Void powers do not affect estates limited. | 7. Same as to personalty. |
| 2. Estates vested, although there is a power of revocation. | 9. Power of revocation suspends payment of portions. |
| 3. { Estates limited in default of appointment also vested. | 10. Conveyance under contract for sale, to uses to bar dower, revokes a will. |
| 4. { | 11. Altered by 1 Vict. c. 26. |
| 5. So if use results. | 12. A mortgage only a revocation pro tanto, unless a regular power is created: now 1 Vict. c. 26. |
| 6. Or is limited to settlor.
How 3 & 4 Will. 4, c. 106, operates. | |

1. WHERE a power of revocation is deemed void, as in the Duke of Marlborough's case before noticed, (a) of course the estates actually limited in the instrument creating the power cannot be affected by the power, but will take effect in the same manner as if it had not been inserted in the instrument. And the law is the same in regard to estates given in default of any appointment under a power, *which is void in its creation. There- [*2] fore, if under a covenant to stand seised a general power

(a) Supra, vol. 1. p. 178.

of appointment be reserved, or given to any person, and for want of such appointment the estate be limited to some person within the consideration of blood, or marriage, as the power would be void, the estate limited in default of appointment would take effect in possession. (b)

2. It is obvious, that every power of appointment is, strictly speaking, a power of revocation to the extent of its operation; but still there is a striking distinction between estates actually limited in a settlement with a power of revocation, and estates limited in default of the exercise of a preceding power of appointment. In the first case, the estates are vested subject to be revoked, or defeated by the exercise of the power.

3. Whether, in the latter case, the estates limited in default of appointment are, during the continuance of the power, contingent or vested, has been the subject of much discussion. The question arose in Leonard Lovie's case, (c) and it was determined, that the estates limited in default of appointment, were contingent. (d) In Walpole v. Lord Conway, (e) Lord Hardwicke held the same opinion. In Cunningham v. Moody (f) he is supposed to have altered his opinion, and to have determined, that the power of appointment does not suspend the vesting of the subsequent remainders; and in Doe v. Martin, (g) after a splended argument, it was solemnly decided, that the estates limited in default of appointment were vested, subject to be divested. The Court relied on Cunningham v. Moody in opposition to Leonard Lovie's and Lord Conway's cases.

Mr. Fearne, who discusses these cases, (h) enforces the [*3] *authority of Doe and Martin; and between the case under consideration, and those upon limitations after a contingent limitation of the fee-simple, takes this clear distinction, that in the latter the limitation is *originally* and *finally* contained in, and made by, the *conveyance itself*, while the former have no

(b) Warwick v. Garrard, 2 Vern. 7; Goodtitle v. Pettoe, Fitzg. 299.

(c) 10 Rep. 78. See fo. 85 a.

(d) See 2 Ves. jun. 704, 5, 6.

(e) 3 Barnard. 153. See 4 Term Rep. 57 n.; and see 2 Ves. jun. 709.

(f) 1 Ves. 174.

(g) 4 Term Rep. 39; and see Doe v. Dorvill, 5 Term Rep. 518; Doe v. Weller, 7 Term Rep. 478.

(h) Cont. Remainders, 290-399, 4th edit.

existence till the power is executed, so, that, in truth, there is no estate limited until an appointment is made.

Lord Rosslyn, in a still later case,(i) at first considered this doctrine very doubtful. He insisted, that in *Cunningham v. Moody*, it was not necessary to determine the point, and treated the case of *Doe and Martin* as a case of compassion. However the point did not then call for a decision; and in pronouncing his decree he did not advert to it. In a subsequent case he treated it as clear that the power did not prevent the estates from vesting.(k) Without considering whether it was absolutely necessary to decide the point in *Cunningham and Moody*, Lord Hardwicke's opinion is too clearly expressed to be misunderstood. He said, that the power of appointment did not make any alteration in vesting of the remainder in fee; for the only effect thereof was that the fee which was vested was thereby subject to be divested.

Besides these leading cases there are several *dicta* upon this point. In a case in Lord Raym.,(l) Powell, Justice, said, that a fee-simple be limited to such persons as A. shall appoint by his will, remainder over, that is a good remainder *vested till* the appointment. In *Goodhill v. Brigham*,(m) Mr. Justice Buller put the very same case, namely, a power to A. to appoint the fee, and in default of appointment, to himself in fee, and held that A. could take nothing till his death, or till his appointment. But he must for the moment have forgotten the decision in *Doe and Martin*, which was decided eight years before, whilst he was a *Judge of the King's Bench, and in which he concurred; [*4] and in a case which occurred about the same period as *Goodhill v. Brighton*, he treated the fee as clearly vested till appointment, and referred to the case of *Doe and Martin* as an authority in that respect. Lord Thurlow,(n) Lord Alvanley,(o) Lord Redesdale,(p) Sir W. Grant, Master of the Rolls,(q) and

(i) *Smith v. Lord Camelford*, 2 Ves. jun. 698.

(k) See 5 Ves. jun. 748.

(l) Vol. 2, 1150.

(m) 1 Bos. & Pull. 198.

(n) *Madoc v. Jackson*, 2 Bro. C. C. 588. See 1 Rep. t. *Redesdale*, 293.

(o) See 4 Ves. jun. 636; *Vanderzee v. Aclom*, ib. 771.

(p) See 1 Rep. temp. *Redesdale*, 293.

(q) See 7 Ves. 583.

Lord Eldon, *(r)* have all expressed themselves decidedly of the same opinion; and in a late case in Ireland, Lord Manners treated *Doe v. Martin* as a clear authority for this construction, and decided accordingly. *(s)*

4. The result of the authorities therefore is, that the power of appointment does not prevent the vesting of the estates limited in default of appointment. *(t)*

5. Where no use is expressed until or in default of appointment, it of course results to the settlor: as where he makes a feoffment to the use of such persons as he shall appoint by will, he is seised in fee until he exercises his power. *(u)*

6. Where the use was actually limited to the settlor in default of appointment, he was still in of the old use, and the case was more strongly in favour of the vesting. But now by the 3 & 4 Will. 4, c. 106, s. 3, where any land shall have been limited by any assurance executed after the 31 December, 1833, to the person or to the heirs of the person who shall thereby have conveyed the same land, such person shall be considered to have acquired the same *as a purchaser* by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate or part thereof. The estate of course still vests, although the quality of it is altered.

[*5] *7. It is equally clear that the same doctrine applies to personalty; and that where the money is absolutely given over in default of appointment, it is vested, subject to be divested by the execution of the power; *(x)* and it is immaterial whether the power be merely to distribute, or to select and exclude. *(y)*

8. Mr. Butler, in his elaborate argument in *Cholmondeley v. Clinton*, laid down five distinct propositions upon the effect of powers, making gifts in default of appointment vested or contingent. The two first were founded upon the exploded doctrines in

(r) See 10 Ves. jun. 265.

(s) *Osbrey v. Bury*, 1 Ball & Beatty, 53.

(t) *Heron v. Stokes*, 2 Dru. & War. 89.

(u) 6 Rep. 18 a.

(x) *Coleman v. Seymour*, 1 Ves. 209. See 2 Ves. 208; *Gordon v. Levi*, Ambl. 364; *Cholmondeley v. Meyrick*, 1 Eden, 77; *Rooke v. Rooke*, 2 Eden, 8; *Reade v. Reade*, 5 Ves. jun. 748.

(y) See *Robinson v. Smith*, 6 Madd. 198.

Leonard Lovie's case, and *Walpole v. Lord Conway*: the three last upon the later authorities, which, for the purpose of distinguishing them from the two former, he endeavored to refer to this ground, viz. that in these latter cases the remainders over are vested in the specified objects, *not in consequence of the limitations over*, but in consequence of the very limitations which contain the power; that is, that the objects would, in the absence of a gift to them in default of appointment, have taken by implication under the terms of the power itself. But these distinctions could not be supported. The early authorities have been overruled. (z)

9. Where a term is created by a settlement to raise portions, with a general power of revocation of the settlement, although the portions become actually due yet while the power subsists, it suspends and prevents the portions from being *payable*, because the donee of the power may revoke at any time before the portions are raised and paid, although the right to the portions is become vested under the terms of the settlement. (a)

*10. The essential difference between a power and an [*6] estate has led to the distinction, that although a partition will not revoke a previous devise where the estate is limited to the devisor in fee, yet if the estate be limited to such uses as he shall appoint, the partition will revoke the devise, although the fee be limited to him in default of appointment. (b) And it has recently been determined. (1) that "a devise of free- [*7]

(z) 2 Jac. & Walk. 40. 60.

(a) *Reresby v. Newland*, 2 P. Wms. 93; affd. Dom. Proc. 2 Bro. P. C. 487. See *Vane v. Lord Duncannon*, 2 Scho. & Lef 118; *Wynter v. Bold*, 1 Sim. & Stu. 507.

(b) Vide *supra*, vol. 1, p. 107, and the cases there cited; and *Barton v. Croxall*, Tambl. 164.

(1) In adverting to this point in the *Treatise on Purchasers*, 4th edit. p. 148, the author added a note on Lord Rosslyn's observation in 2 Ves. jun. 429, 430, that the rule in equity, that a devise of an equitable estate is not revoked by taking the legal estate, was first established at law. In *Rawlins and Burgis* the above note was, I am told, cited by the Court with approbation. The reporters have made the following observations on the note in question:—"It seems extraordinary that such an error should be imputed to Lord Rosslyn in his very able judgment upon this subject, as the conception that a feoffment to the use of a man before the statute of uses conferred the legal seisin, or that the fact was at variance with his lordship's statement, that the feoffment was to the use of the devisor. As an instance of a decision at law, that by taking the legal estate a devise is not revoked, his lordship translates, correctly and literally, this case from Rolle, who states shortly the ground, that after the feoff-

hold estate contracted for, is revoked by a subsequent conveyance to the usual uses to bar dower, where the contract does not provide for the conveyance of the estate to such uses.(c)

11. But the law is now altered by the 1 Vict. c. 26, which provides, that no conveyance or other act made or done subsequently to the execution of a will of or relating to any rent or personal estate therein comprised (except an act amounting to a revocation under the Act) shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death.(d) And it further provides, that every will shall be construed, with reference to the real and personal estate comprised in it, to speak and to take effect as if it had been exe-

ment the deviser had the use as before; guarding against any inference from that fact, and probably thinking it unnecessary to add the general effect of the statute transferring the seisin. To that Lord Rosslyn evidently points; meaning to represent the case as amounting to an authority for his position, considering the distinction as to the mode of acquiring the legal estate, whether by the statute or by conveyance, immaterial." 2 Ves. & Bea. 335 n.

The object of the note in the book on Purchases was not to impute error to Lord Rosslyn, who in fact borrowed the observation from Lord Hardwicke, but to show that no such rule of law ever existed. If, however, as it is insisted, Lord Rosslyn did understand the case correctly, he must have known that it did not establish the rule which he stated, for Rolle himself shows that the statute of uses, by turning the use into a possession, destroyed the use, and consequently any devise of it before the statute. The reason why the will was not revoked in the case in Rolle, cited by Lord Rosslyn, was, "that the deviser had *the same use* which he had before;" consequently the legal estate was vested in him, not by the conveyance but by the statute of uses, and the will must have been within the saving in the statute. If the will had not been saved by the statute it would have had no operation. Lord Rosslyn was certainly in error. He either overlooked the circumstance that the feoffment was to *the use of* the deviser, and not to him at once, or he forgot that the statute itself if it did not vest the legal estate in the deviser, destroyed the will, unless it was within the saving in the act. In no view of the case can it possibly be considered as a decision establishing the rule stated by Lord Rosslyn. Indeed the statute of uses was passed to put an end to the testamentary power over land through the medium of uses, but it contained a saving of wills made before the statute by persons who died before the 1st of May 1536. This saving of itself shows that the legislature considered that the act by its operation would defeat existing devises of uses. Therefore the decision in question did not establish a general rule of law, but was founded on the particular saving in the statute, which took the case out of the general rule.

(c) Rawlins v. Burgis, 2 Ves. & Bea. 382. The decision was appealed from. See Ward v. Moore, 4 Madd. 368; Buller v. Fletcher, 1 Kee. 369. 600; 2 Myl. & Cra. 432 the discussion in the last edition upon these cases is now omitted.

(d) Sec. 23.

cuted immediately before the death of the testator, unless a contrary intention shall appear by the will.(e) Now, therefore, in the case of the partition, clearly the fee would pass, and it would seem that such a power as that above referred to would be executed by the prior will. And now, after a devise of an estate contracted for, no form of conveyance to the purchaser after the will can affect the devise; for in "whatever mode conveyed to him, the interest which he has at his death will pass by will.(f)

12. In a case of a different nature from *Rawlins v. Burgis*, viz. upon the effect of a mortgage subsequently to the will as a total revocation, the mortgage contained a direction that upon payment of the money, the estate should be reconveyed to himself, his heirs and assigns, or to such person or persons, and for such estate and estates, and to and for such lawful trusts, intents and purposes, as he, his heirs and assigns, should by any deed or instrument in writing direct, limit or appoint; and it was held that no new power was created, and therefore the mortgage was only a revocation *pro tanto*.(g) The Court observed, that the true question was, whether by the addition of the words which follow the direction to reconvey to the mortgagor and his heirs, he did in fact acquire any new estate or power, or whether those subsequent words did not leave him with the same estate and the same powers as he would have had if they had not been used. It was plain, that he who has a right to call upon trustees to convey to himself and his heirs, has a right, by any instrument under his hand, to direct the same trustees to convey to the use of any other person, and for any estates and interests, at his pleasure. The authority to make such direction, by any deed or instrument under his hand, is the necessary consequence of this conversion of his legal estate into an equitable interest, and the subsequent words are the mere "*expressio eorum quæ tacite insunt*." The V. C. was of opinion, therefore, that the conveyance, being by way of security for money, was a revocation *pro tanto* only. This opinion did not interfere with the case of *Tickner v. Tickner*, where a new power to appoint to uses was acquired. But either case would now fall

(e) Sec. 24.

(f) H. Sugd. Wills, 53.

(g) *Brain v. Brain*, 6 Madd. 221; vide *supra*.

within the provisions of the 1 Vict. c. 26, to which we have already adverted.

[*9]

*SECTION II.

OF THE OPERATION OF INSTRUMENTS EXECUTING POWERS.

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|---|--|
| 2. Instrument operates as a declaration of the use. | 16. Death of appointee will not defeat a charge for another. |
| 3. Will operates also as a proper will. | 17. Law of lapse under 1 Vict. c. 26. |
| 4. Revoked by a covenant to sell. | 18. Will not revoked by taking a transfer of the fund |
| 5. Or by a conveyance, though a bad appointment. | 19. Contra by taking a conveyance of the estate. |
| 6. Although the donee is a married woman. | 23. Hurst v. Winchelsea; heir takes by descent although appointee. |
| 7. Unless in her case the deed is merely void. | 24. Operation of 3 & 4 Will. 4, c. 106. |
| 10 Appointment by will lapses by appointee's death. | 25. Will of personalty must be proved. |
| 11. Appointment to executors of a person living. | 27. Deed of appointment must be registered in register county. |
| 12. Lapsed legacies fall into residue. | 28. Is a conveyance within stat. of Eliz. |
| 13. If payable out of real estate, common rule applies. | 29. Appointee claims <i>under</i> donee within a covenant. |
| 14. The whole sum may lapse into the residue. | 31. Loss of part of fund falls on the residue. |
| 15. Legacies to persons not objects may fall into residue duly given. | 33. Where joint power in husband and wife over her estate makes him a purchaser of money borrowed. |

1. WE are now to consider the effect of the execution of a power.

I propose to treat, first, of the operation of the instrument executing the power; secondly, of the manner in which the estates created take effect in regard to themselves; and thirdly, of the effect of the execution of the power on the estates in the settlement.

2. First, with regard to the instrument: in whatever mode the power is exercised, whether by an act *inter vivos*, a grant, [*10] bargain and sale, lease and release, covenant to stand seised, feoffment, or fine, or by a will, the instrument in every case operates strictly as an appointment or declaration of

the use, *(h)* and therefore, in consequence of the rule before noticed, that there cannot be a use upon a use, the bargainee, &c. takes the legal estate, the appointment being made to him ; and if any ulterior use is declared, it operates merely as a trust in equity. If the power be executed by way of covenant to stand seised, the use would vest in the person intended to take beneficially.

3. But a *will* made in execution of a power has a peculiar operation ; it not only operates as an execution of the power, but also in most respects partakes of the qualities of a *proper* will. We have seen, that if a power of revocation is not reserved in a *deed* executing the power, the instrument is irrevocable ; but this does not hold good as to a *will*, for although in truth it is not strictly a will, but simply a declaration of use, yet it so far retains the properties of a will as to be ambulatory till the death of the testator, and consequently revocable without any express power reserved for that purpose. *(i)*

4. So such a Will will be revoked by a covenant amounting in equity to a conveyance, in the same manner as a proper will ; *(j)* and this rule is not, it has been held, altered by the 23d section of 1 Vict. c. 26 ; *(k)* and, generally, a will under a power, will be revoked by any act amounting to a revocation in law of a proper will, *(l)* or by any of the methods pointed out by the Statute of Frauds, *(m)* whilst that act continues to operate ; or by the modes prescribed by the 1 Vict. c. 26, where the case falls within its provisions.

*5. Therefore although a power over real estate was [*11] confined to a will, and was exercised by a will, yet a subsequent conveyance by deed to a purchaser, although a void execution of the power, would have operated as a revocation of the will, *(n)* under the old law. In general, a void act which leaves the interest in the testator at the time of his death, will

(h) See Attorney-general v. Bradley, 1 Eden, 482.

(i) Hatcher v. Curtis, 2 Freem. 61 ; and see 1 Ves. 139 ; 2 Ves. 77. 612 ; Lisle v. Lisle, 1 Bro. C. C. 533, Lawrence v. Wallis, 2 Bro. C. C. 319.

(j) Cotter v. Laver, 2 P. Wms. 662. See 1 Treat. Purch. 183, 184.

(k) Farrer v. Lord Winterton, 5 Beav. 1 ; Moor v. Raisbeck, 12 Sim. 123.

(l) Reid v. Shergold, 10 Ves. jun. 370 ; Shove v. Pincke, 5 Term Rep. 124. See Ex-parte Lord Ilchester, 7 Ves. jun. 348 ; Richardson v. Barry, 3 Hagg. 249.

(m) 2 Ves. 77.

(n) Reid v. Shergold, ubi supra.

not defeat the operation of the prior will under the 1 Vict. c. 26.

6. A married woman's will under a power will be revoked like other wills by an invalid appointment under the power by act *inter vivos*, if equity will aid the defective execution.(o)(1)

7. But the will of a married woman made in the execution of a power which could be exercised by will only, will not be revoked by a deed executed during the coverture, and after her will manifesting a different intention. For such a deed is altogether inoperative at law and in equity as an appointment, and is therefore not permitted to revoke the prior will. The distinction is a refined one between this case and some others in the books, but it has the merit of giving effect to the only appointment which can operate.

8. The point was decided in *Eilbeck v. Wood*,(p) where by a deed, in 1799, an estate was settled to such uses as A., whether sole or married, should appoint by deed or writing, &c., and in default of such appointment, upon trust for her separate use, and after her decease, to such uses as she should appoint by will, and in default of such appointment, to the use of her children in tail, with remainders over. By a marriage settlement in 1800, A. in exercise of her first power, appointed the estate after the marriage to trustees during the joint lives of herself and her intended husband for her separate use, and *if she should die in his lifetime*, then to such uses as she should appoint by will, and in

[*12] default of such appointment, to the uses by the deed of 1799 *limited after her decease; but if she should survive him, then to such uses as she should appoint by deed or writing, &c., and in default of such appointment, to the uses limited by the deed of 1799. After the marriage, by her will, under her power, in the settlement of 1800, she gave the estate to the husband in fee. By a deed executed by her and her husband in 1811 which recited the settlement of 1799, but not that of 1800, A., by virtue of the power in the former settlement, and of all other powers enabling her in that behalf, appointed the

(o) *Cotton v. Laver*, 2 P. Wms. 623.

(p) 1 Russ. 564, prior to Vict. c. 26.

estate to her husband for life, then to herself for life, and then to the children of the marriage in strict settlement, with remainder to the husband in fee. The deed was attested by two witnesses, as required by the settlement of 1799. A. died in her husband's life-time. The court of King's Bench, upon a case directed by the Court of Chancery, certified that the deed of appointment did not revoke the will, and that certificate was confirmed in equity.

9. In a case where it was doubted whether an appointment giving a power to appoint by will to a married daughter was valid, a settlement was made by herself and her husband and a party entitled to a share if the power was invalid, which settlement was held to be confined by construction to the interests of the parties if the power was invalid, and the daughter having after the settlement made her will and exercised the power, and subsequently appointed a new trustee under the settlement, the latter deed was held to be no revocation of the will which was operative, as the power was held to be well created ;(1) and it was decreed that the husband, as appointee under his wife's will, was not bound to make good the settlement.(q)

10. Again, the appointment will lapse by the death of the donee in the testator's life-time : (r) but although the appointee survive the testator, he will only take from the time of the testator's death : (s) and therefore where the donee [*13] of a power by will executed it by his will, and then became bankrupt, and obtained his certificate and died, it was held that the certificate barred the right of the assignees, as the appointment operated only from the testator's death. (t)

11. Of course, executors cannot take derivatively from the appointee, yet an appointment may be made to executors or administrators, who may be used in a will as distinct from the tes-

(q) *Phipson v. Turner*, 9 Sim. 227. This case furnishes no rule ; it was prior to 1 Vict. c. 26.

(r) *Oke v. Heath*, 1 Ves. 135; *Vanderzee v. Aclom*, 4 Ves. jun. 771; *Burgess v. Mawbey*, 10 Ves. jun. 319; *Earl of Salisbury v. Lambe*, Amb. 385.

(s) *Duke of Marlborough v. Lord Godolphin*, 2 Ves. 61, S. C. MS.; *Southby v. Stonehouse*, 2 Ves. 616; *Vanderzee v. Aclom*, 4 Ves. jun. 771.

(t) *Jenny v. Andrews*, 6 Madd. 264.

tator, and as persons designated to take in the event of the death of the appointee, in the testator's life-time.(u)(1)

12. So lapsed legacies of personalty will fall into the residue(x) where the residue is duly given in execution of the power.

13. And where there is a lapse of a legacy to be paid out of money to arise from the sale of an estate directed to be sold by will under a general power, the common rules apply, and it will either, in case of a lapse, fall into the residue or go to the heir at law, just as if the testator had been seised in fee of the estate: but of course it could not go to the heir-at-law, unless the testator was seised of the fee subject to the power.(y)

14. And even where the whole sum is appointed to a legatee under a limited power, yet it will, in case of a lapse by death, fall into a general "residue of what the testator has power to dispose of," and not go, as in default of appointment, [*14] "to the persons entitled under the instrument creating the power; and although the residue is given subject to the payment of legacies to persons not objects of the power, yet if there are other funds upon which the gift of the residue will operate, it will be considered as the gift of two funds, upon condition to pay out of one over which he had power to make such disposition.(z)

15. So where legacies are given by a will under a limited power to *persons not objects of it*, and the *residue* is given to proper objects, although expressly "after payment of the above legacies," the particular legacies, by analogy to the rule as to lapsed legacies, will fall into the residue, and no part of the fund will be considered as unappointed.(a)

16. Nor, in equity, will the death of the appointee defeat a

(u) *Burnet v. Helgrave*, 1 Eq. Ca. Abr. 296, pl. 2. See 2 Ves. 80.

(x) *Oke v. Heath*, ubi sup.; *Falkner v. Butler*, Ambl. 514; *Easum v. Appleford*, 10 Sim. 274; 5 Myl. & Cra. 56.

(y) *Hutcheson v. Hammond*, 3 Bro. C. C. 128. See *Kennett v. Abbott*, 4 Ves. jun. 802.

(z) *Oke v. Heath*, 1 Ves. 135.

(a) *Falkner v. Butler*, Ambl. 514.

(1) This is the principle established by this case; but whether it was rightly applied to the facts in that case is another question. See *Oke v. Heath*, *Duke of Marlborough v. Lord Godolphin*, and *Vanderzee v. Aclom*, cited sup.

charge on the interest appointed to him in favour of a person who survives the testator.(b)

17. The general law as to lapse has been greatly altered by the 1 Vict. c. 26, the provisions in which the Courts will have to apply to wills under powers, as far as they fall within them. The provisions generally are, that a devise even of real estate which lapses will be included in the residuary devise in the will ;(c) and a devise of an estate tail does not lapse if there is issue living at the testator's death, for they are to take ;(d) and upon gifts by will to a child or other issue of the testator, the gift will not lapse if there is at the testator's death any issue of the devisee or legatee, unless a contrary intent appear by the will.(e) Where personal estate was settled on the children as the mother should appoint by deed or will, and the children were to take equally, in default of appointment, a testamentary appointment to a child who died in the mother's lifetime was held not to be within the statute.(f)

*18. In a case where personal estate was before marri- [*15] age vested in trustees for the wife's separate use for life, then to the issue of the marriage, then to such persons as the wife should by will appoint, *and in default thereof, to her absolutely* and power was given to her to make a will, notwithstanding her coverture ; by her will, made during the coverture, she disposed of the fund under the power. Her husband afterwards died without issue, and she then took a transfer of the stock into her own name, and Lord Kenyon held that the will was not revoked, as no alteration of intention was shown. He considered that the intervention of the trustees was not necessary after the husband's death. It had been decided that where a person having an equitable interest in real property devises it, and afterwards gets the legal estate, this will be no revocation ; so here there was no new beneficial interest acquired. If, therefore, this were to be construed with equal strictness as the rules respecting real estate, it would be no revocation, much less so in case of person-

(b) *Oke v. Heath*, ubi sup. See *Taylor v. George*, 2 Ves. & Bea. 378.

(c) Sec. 25.

(d) Sec. 32.

(e) Sec. 33. See II. Sugd. Wills, 103-118.

(f) *Griffiths v. Gale*, 12 Sim. 355.

alty.(g) The will was capable of support, as one made by the woman of her interest, with her husband's assent, given by the settlement.

19. But immediately afterwards Lord Thurlow decided differently as regarded the real estate of the same lady.(h) By the settlement the real estate was conveyed to trustees, in trust to convey it as she, whether sole or covert, should by deed or will appoint.(I) By her will she gave the property under her power, in case she had no children, to her relations. Her husband, as we have already seen, died without issue, and after his [*16] death, she by a deed, in exercise of her power, directed the trustees to convey, and they conveyed the estate to herself in fee; and Lord Thurlow said the question was, which of the acts was an execution of the power. There was no doubt it was executed by the conveyance to her own use.

20. In the recent case of *Clough v. Clough*,(i) personal estate was settled as the wife should appoint by deed or writing, and in default of such appointment, if the wife survived the husband (which happened,) as she, whether covert or sole, should by will appoint, and in default thereof, to her next of kin. She made her will in her husband's lifetime, and after his death took an assignment of the funds to herself, and it was held to be no revocation. The Master of the Rolls said that if, after a will made of real estate, the quality of that estate be changed, the will is revoked; because by the statute of wills no real estate can be devised of which the party is not seised at the time. The principle has no application to personal estate, which will pass by a will expressed in general terms, although subsequently acquired. The testatrix at the time of the will had the whole beneficial interest in her personal estate,(II) and the vesting of the legal interest in her by the assignment of the trustee would in no manner affect the

(g) *Dingwell v. Askew*, 1 Cox, 427.

(h) *Laurence v. Wallis*, 2 Bro. C. C. 319; consider now the operation of the 1 Viet. c. 26.

(i) 3 Myl. & Kee. 296.

(I) This is the statement in *Brown: The Register's book* (1787, B, fo. 23) does not state the uses or trusts of the settlement: the estate was probably settled on the issue, and in default of issue and of appointment, on herself in fee.

(II) This is hardly correct. She had the power to acquire the whole beneficial interest, but the whole beneficial interest was not at any period vested in her under the settlement.

bequests of the will. The mere accession of the legal to the beneficial interest is not a revocation even of real estate.

21. How far a woman's Will will be revoked by her subsequent marriage has already been incidentally considered in another place.

22. The same latitude is allowed in the terms of the devise as in the case of a proper will; but this doctrine has already been discussed.(j)

*23. The analogy has been carried so far, that where [*17] under a settlement a married woman had a general power of appointment, *and a limitation in fee in default of appointment*,(k) and by her will appointed the fee to her heir-at-law, it was held that he took by descent and not by purchase as an appointee, or in other words, that the appointment did not operate.(k) Lord Mansfield said, that the whole point in the case was, whether in legal construction the heir is to be supposed to have taken an estate by purchase, vested in him in the lifetime of his mother, by relation to the deed of release, or nothing until her death; because if nothing passed until her death, then the appointment gave him only *simul et semel* what the law gave him. *If the will, with all its qualities, must be considered as inserted in the deed, then this amongst others must be inserted, viz. that she could not devise to her heir.* The only question was, did anything vest in the son before his mother's death? If not, let it be by will, power or otherwise, it cannot operate. The decree of Lord Keeper Henley, in conformity with the judgment of the King's Bench, was appealed from to the House of Lords, but the appeal was compromised.(l) But it was not doubted that the appointee would have taken by purchase if the fee had not been vested in the testatrix.

24. The reasoning upon the point decided is not very satisfactory, and the difficulty is not lessened by the law, in analogy to which the case was decided, having since been altered by the

(j) Vide *supra*, ch. 6, sect. 2; 1 Vict. c. 26.

(k) *Hurst v. the Earl of Winchelsea*, 1 Blackst. 187; 2 Lord Keny. 444. See *Langley v. Sneyd*, 3 Brod. & Bing. 243; 1 Sim. & St. 45, and 7 Moore, 165.

(l) 2 Burr. 882.

(I) In Blackstone's Report this limitation is omitted, and the case was stated from that Report in the former editions of this work. The case is correctly reported by Lord Kenyon.

Legislature, without any provision having been made for this case. The 3 & 4 Will. 4, c. 106, s. 3, (and see s. 12,) enacts that when any estate shall have been *devised* by any testator, who [*18] shall die after the 31st December 1833, to the heir, or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the land as a devisee, and not by descent; and when any land shall have been limited *by any assurance* to the person, or to the heirs of the person who shall thereby have conveyed the same land, such person shall be considered to have acquired the same as a purchaser, by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate, or part thereof; and in this last provision the word "assurance" means any deed or instrument other than a will.(m) But although the appointment by will is not strictly a devise, yet for many purposes it is so considered, and the case of Hurst v. Winchelsea itself, as far as it is an authority, establishes this doctrine to its utmost limits; and therefore it seems probable that where the testator has both a power and the fee, the case would now be deemed to fall within the act, and that therefore the appointee would be held to take by purchase, without disturbing the authority of Hurst and Winchelsea.

25. Where the will relates to personalty,(n) it must be proved in the Spiritual Court. This has been determined even in regard to an appointment by the will of a *feme covert*, who cannot in the notion of law make a will,(o) although a different opinion appears at one time to have prevailed.(p) The Courts of Equity will not, however, at this day, read the appointment by will until it is duly proved as a proper will in the Spiritual Court, nor will the probate preclude the necessity of proving the instrument as an appointment, upon any claim under it in a Court of Equity,(q)

for the Ecclesiastical Court can only decide that the act [*19] is testamentary, and has no jurisdiction to determine

(m) Sect. 1.

(n) See Hume v. Rundell, 6 Madd. 331.

(o) Ross v. Ewer, 3 Atk. 156.

(p) Daniel v. Goodwin, Exch. T. T. 8 & 9 Geo. 2, MS. App. No. 20; and in Shar-delow v. Naylor, 1 Salk. 313.

(q) Rich v. Cockell, 9 Ves. jun. 369. See Watt v. Watt, 3 Ves. jun. 244; Cothay v. Sydenham, 2 Bro. C. C. 391.

whether an instrument is a good execution of a power ;(*r*) but it is conclusive upon the question whether the instrument is to be taken as a valid testamentary instrument.(*s*)

26. We shall presently see that estates created by the execution of a power take effect as if created by the original deed ; and, in general, a deed executing a power cannot be considered as a new alienation, or independent conveyance ;(*t*) but still there are cases in which a deed executing a power is for many purposes considered as a substantive independent instrument.

27. Thus such a deed affecting an estate in a register county must be registered ; it is within the mischief intended to be guarded against by the acts, as a purchaser could not otherwise discover whether the power has been exercised.(*u*)

28. So a deed executing a power over real estate has been deemed a *conveyance* within the statute of Elizabeth, so as to be fraudulent, because it was a conveyance.(*x*) So on an issue to try whether the plaintiff was entitled by two writings, or any other, purporting a will of J. S., and the evidence was of a feoffment to the use of such person as J. S. should appoint by his will ; in which case it was contended that the devisees were in by the feoffment, and not by the will ; the Court held that this was only *fictione juris*, for that they were not in *without* the will, and therefore that was the principal part of the title, and such proof was good enough, and pursuant to the issue, and a verdict was accordingly given for the plaintiff.(*y*)

29. So, although the estate did not originally belong to *the donee of the power, and the estate created by the [*20] appointment is considered as limited by the deed creating the power, yet a person deriving title under an appointment is considered as claiming *under* the donee, within the meaning of a covenant by him for quiet enjoyment against any person claiming under him.(*z*)

(*r*) See 3 Ves. Jun. 246 ; *Exparte Tucker*, 1 Mann. & Grang. 519 ; *Tucker v. Inman*, 1 Car. & Mars. 82 ; 4 Man. & Gran. 1049.

(*s*) *Douglas v. Cooper*, 3 Myl. & Kee. 378.

(*t*) See Coke's argument in *Lady Gresham's case*, Mo. 261.

(*u*) *Scrafton v. Quincey*, 2 Ves. 413.

(*x*) See 2 Ves. 65.

(*y*) *Bartlett v. Ramsden*, 1 Keb. 570.

(*z*) *Hurd v. Fletcher*, Dougl. 4.

30. Where there is a power to appoint part of a settled fund, the execution of the power takes the part appointed entirely out of the settlement; although, therefore, the beneficial interest in it is not in terms immediately disposed of, yet there can be no resulting trust for the benefit of any person under the deed creating the power; for where the principal of the fund is appointed it must be considered as if it had never been comprised in the trust, because it is absolutely taken out of it by the execution of the power. Therefore where a wife—under a settlement of her personal property, which was settled on herself and her husband, and the survivor, and was afterwards to be laid out in land to be settled on the heirs of her body by him, remainder to the survivor in fee—had a general power to appoint 1,500*l.*, part of the money, and she did appoint it to a trustee to pay to her nieces 1,500*l.* and 500*l.* respectively when twenty-one, or at marriage; it was held, that the sum was wholly taken out of the settlement, and that there was no resulting trust, and the trustee having the whole capital money in his hand for the benefit of the *cestuis que trust*, the capital would draw the interest with it.(a)

31. If the fund sustain a loss, the sum subjected to the power may be appointed, and the loss must be borne wholly by the persons entitled to the residue.(b)

32. Where husband and wife raise money out of the wife's estate, with the reversion to the one or to the other, equity inquires into the uses, considers them as two persons, and if [*21] the expression may be used, dissolves the marriage *quoad* the transaction. Though the husband covenants to pay the money and gives a bond, yet the application determines who is the principal, who is the surety.(c)

33. In *Lewis v. Nangle*,(d) however, where a woman's real estate was settled on her marriage on her husband for life, *sans* waste, remainder in like manner to the wife, and then to the issue of the marriage, with remainder to herself in fee, with a joint power of revocation and new appointment in herself and her husband: they exercised the power and revoked the uses, and mortgaged the estate for a sum of money, part of which was

(a) *Mansell v. Price*, Rolls, MS. App. No. 21.

(b) *Oke v. Heath*, 1 Ves. 135. See *Shelley v. Earsfield*, 1 Rep. Cha. 110.

(c) Per Lord Camden, 3 Swanst. 217.

(d) *Ambl.* 150; 1 Cox, 240; 3 Swanst. 212 n.

to pay her debts whilst sole, and the rest to supply his occasions, and he covenanted to pay the money, and they resettled the estate as before, but not making the estate for life, *sans* waste, and limiting the remainder in fee to the wife's sister, who was the mortgagee: Lord Hardwicke considered that as a new settlement was made, and part of the money was to pay the wife's debts, the husband was bound to keep down the interest only, and not to pay off any part of the principal. Lord Camden considered him as a purchaser of the very loan from the joint power of revocation.(e)

34. And where a husband is liable to pay off money raised on his wife's estate for his benefit by the execution of a power, her devise under her power, of the estates to him for life, and after his death over, "subject to such incumbrances as the same are now subject to," will not be deemed an exclusive charge upon the estates, so as to exonerate him from his previous liability.(f)

*SECTION III.

[*22]

OF THE GENERAL OPERATION OF ESTATES CREATED UNDER POWERS.

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|--|---|
| <ol style="list-style-type: none"> 1. Take effect as if created by the deed raising the power. 3. But only from the time the power is executed. 4. Husband and wife may appoint to each other. 5. Rule in Shelley's case operates after an appointment. 8. Power not a remainder. | <ol style="list-style-type: none"> 9. Appointee not liable in some cases to covenant running with the land. 10. Interest appointed is subject to appointee's debts. 11. Appointee of a fund under a general power, takes subject to appointor's debts. 12. But a purchaser from a voluntary appointee not liable. |
|--|---|

14. Power to sell: assets equitable.

1. THE estates created by the execution of a power take effect precisely in the same manner (with the exception which will shortly be noticed) as if created by the deed which raised the

(e) 3 Swanst. 217, 218, n.

(f) Earl of Kinnoul v. Money, 3 Swanst. 202: there were specialties in the case.

power. Thus, suppose a general power of appointment to be given to a man by deed, and he by virtue of his power to limit the estate to A. for life, with remainder to his children in strict settlement, these limitations will take effect as estates limited by the original deed, and in exactly the same way as they would have done had they been limited in that deed by the grantor of the power.(g)

2. By the 3 & 4 Will. 4, c. 74, for the abolition of fines and recoveries, it is enacted that every assurance already made or thereafter to be made, whether by deed, will, private Act of Parliament, or otherwise, by which lands are or shall be entailed or agreed or directed to be entailed, shall be deemed a [*23] settlement; and every appointment made in *exercise of any power contained in any settlement shall be considered as part of such settlement, and the estate created by such appointment shall be considered as having been created by such settlement.(h)

3. It has been contended, that the acts done in consequence and by virtue of an authority, and pursuant thereto, are the acts of the old proprietor, *and of that day wherein he in virtue of his ownership delegated that authority*. But this Lord Hardwicke over-ruled. He admitted the principle, that where a person takes by execution of a power, whether of realty or personality, it is taken under the authority of that power, *but not from the time of the creation of that power*. The meaning that the persons must take under the power, or as if their names had been inserted in the power, is that they shall take in the same manner as if the power and instrument executing the power had been incorporated in one instrument; then they shall take as if all that was in the instrument executing had been expressed in that giving the power. So it is in appointments of uses. If a feoffment is executed to such uses as he shall appoint by will, when the will is made, it is clear that the appointee, *cestui que use*, is in by the feoffment, but has nothing from the *time of the execution of the feoffment* so as to vest the estate in him. The estate will vest in him according to the act done and appointment of the use from the time of the testator's death. This, therefore, is not a relation so as to make things vest from the time of the power, but accord-

(g) See *Middleton v. Crofts*, 2 Atk. 661.

(h) Sect. 1.

ing to the time of that act executing that power; not like the referring back in case of assignment in commission of bankruptcy that is, by force of the statute, and to avoid mesne wrongful acts.(i)

4. This doctrine, that the appointee takes under the original deed, is followed in all its consequences. *Therefore, although a husband cannot at common law convey di- [*24] rectly to his wife, yet he may make an immediate appointment to her ;(k) because her estate arises out of the original seisin; and for the same reason a wife may appoint immediately to her husband; the principle is something similar to that which prevails in copyholds, where a surrender by the husband to the wife, or by the wife to her husband, is good.(l)

5. So although a limitation to A. for life by one instrument, and a limitation to his heirs, or heirs of his body, by another, cannot unite according to the rule in Shelley's case, yet a limitation to A. for life by deed, and a limitation afterwards in his lifetime to his heirs, or the heirs of his body, under an execution of a power of appointment contained in the deed creating the life-estate, will coalesce so as to give the inheritance to A. Perhaps the nearest case to this in the old books is Pybus and Mitford, where a limitation to the heirs of the body of A. was held to unite with an estate for life which resulted to him by the same deed. Mr. Fearn, in his investigation of this point, considers it clear that the limitations will unite: he treats the deed executing the power as a branch of the original settlement, merely directing the operation of it, *quoad* the uses appointed, and consequently the limitations in such appointment are part of such settlement, and, by relation, virtually contained therein from the time of the appointment, only declared by way of reference to a subsequent specification thereof. He treats the rule in Shelley's case as requiring no identity of time in the declaring, but only of the instrument creating the two limitations; and to show that the estates may vest at different times, he refers to the common case of an estate to two or more, for their lives, remainder to the

(i) Per Lord Hardwicke, *Duke of Marlborough v. Lord Godolphin*, 2 Ves. 61; and see *Southby v. Stonehouse*, ib. 610, accordingly.

(k) See *Latch*. 44; 2 Wills. 402.

(l) See *Bunting v. Lepingwel*, 4 Rep. 29 a.

right heirs of the survivor of them, and the case put in 1 Inst. (*m*) that if lands be given to two during their joint lives, [*25] remainder to the heirs of him who shall die first, the heir will be in by *descent*, which are direct authorities that no identity in point of time of vesting of the two estates is requisite to the operation of the rule. (*n*)

6. When these observations were made by Mr. Fearn, no judicial opinion had been delivered on the point, but in Venables and Morris (*o*) the very question arose. Under a settlement the husband was tenant for life, remainder to trustees and their heirs generally, to preserve remainders, with remainder (after several uses which never arose) to such uses as the wife should appoint. She appointed to the right heirs of her husband. The Court ultimately held that the *fee-simple* vested in the trustees, so that the estate limited under the power being merely equitable, could not unite with the limitation to the husband for life in the deed, which was a legal estate; but Lord Kenyon treated it as quite a clear point, that the appointment was to be considered in the same light as if it had been inserted in the original deed by which the power of appointment was created; and therefore he held, that if the limitation to the heirs of the husband had been a legal estate, it would have enlarged the estate in the ancestor, and given him a fee. The point may be considered as settled.

7. It is hardly necessary to observe that it was never doubted that the operation of the rule in Shelley's case is not to exclude remainders intervening between the prior estate of freehold and the subsequent limitation to the heir or heirs of the body of the tenant for life, although this point was actually argued in Doe v. Welford, (*p*) and nothing fell from Lord Kenyon, in Venables v. Morris, to warrant such an argument. (*q*) Of course where, as in Doe v. Welford, the subsequent limitation is to the [*26] tenant for life himself *and* the heirs of his body there is no room for the operation of the rule, but he is tenant for life under the first limitation, and (subject to intervening limitations) tenant in tail under the second limitation.

(*m*) 1 Inst. 278 b.

(*n*) Contingent Remainders, 99, 4th edition.

(*o*) 7 Term Rep. 342. 438.

(*p*) 12 Adol. & Ell. 61.

(*q*) See *ib.* p. 71.

8. But the rule does not apply so as to treat a *power* as a remainder, and therefore an appointment under it as void, because the particular estate determined before the power arose. Thus where the husband was, under his own marriage settlement, tenant for life, with remainder to trustees during his life to preserve contingent remainders, with remainder to trustees for a term of years to secure a jointure to the wife, with remainder to the use of such children of the marriage as the husband and wife jointly, or in default of such appointment as the survivor should appoint, and in default of such appointment to the issue of the marriage living at the decease of the survivor of the husband and wife, and in default thereof to the right heirs of the husband forever. The husband died in the wife's lifetime, and she afterwards exercised her power, and it was argued that the estates limited by the execution of the power were to be considered as if they had been created by the deed creating the power. For some purposes the Court said that was true, but the rule was referred to for the purpose of building upon it this argument, that limitations, which may possibly take effect as remainders, shall not be considered as springing uses, and that if considered as remainders they would have failed by the death of the father in the lifetime of the mother. The Lord Chancellor observed that no authority had been produced to show that this rule applied to such cases as the present, which would, in effect, be to subject to the same rule a contingency depending upon future events, and the result of a discretion to be exercised at a future time. (r)

9. As a consequence of the general rule, it has been determined, that where an estate was conveyed to such uses as A. should appoint, and in default of appointment to himself in fee, yielding and paying a fee-farm rent, which he [*27] covenanted to pay accordingly, and afterwards, *by virtue of his power*, he conveyed the estate to a purchaser, such purchaser was not subject to the covenant for payment of the rent, or although the covenant ran with the land in the first instance, yet it ceased to do so in the hands of the purchaser, because he did not take the interest of the original grantee, but took as if the original conveyance had been made to himself. (s) This de-

(r) *Hole v. Escott*, 4 Myl. & Cra. 187; vide *supra*, vol. 1, p. 84.

(s) *Roach v. Wadham*, 6 East, 289.

cision leads to the observation, that wherever a purchaser is to enter into a covenant, which it is intended shall run with the land, the vendor ought to insist upon the purchaser taking a conveyance to himself in fee, and should not permit the estate to be limited to the usual uses(*t*) to bar dower.

10. Of course the beneficial interest a man takes under the execution of a power forms part of his estate, and is, according to the nature of the property, subject to his debts like his other property; nor indeed, can an appointment be made so as to protect the funds from the debts of the appointee.(*u*)

11. But equity goes a step farther, and holds that where a man has a *general* power of appointment over a fund, and he actually exercises his power, whether by deed or will, the property appointed shall form part of his assets, so as to be subject to the demands of his creditors, in preference to the claims of his legatees or appointees.(*x*) But in order to raise this equity [*28] the power must be actually executed, for 'equity, as we shall hereafter see, never aids the non-execution of a power.(*y*)

12. And although creditors in these cases prevail over volunteers, yet if a party taking under a voluntary appointment to sell to a person *bonâ fide* and for a valuable consideration, such person, in analogy to the decisions on the statute of voluntary conveyances, will be preferred to the creditors(*z*) as having a preferable equity to them. Sir W. Grant observed, that in the case of an appointment of property, over which a man has a power unlimited as to objects, he who pays a consideration to the voluntary appointee may constructively be held to be in the same situation as if he had in the first instance paid it to him by whom the power has been executed. But in such a case the claim of the assignee, he observed, was allowed to prevail, not against persons

(*t*) See 2 Treat. of Purch. 79, 80.

(*u*) *Alexander v. Alexander*, 2 Ves. 640.

(*x*) *Lassels v. Lord Cornwallis*, 2 Vern. 465; *Free. Cha.* 232; *Thompson v. Towne*, 2 Vern. 319; *Hinton v. Toye*, 1 Atk. 465; *Shirley v. Ferrars*, 2 Atk. 172; 2 Ves. 2. 8, 9; 7 Ves. jun. 503 n. cited; see *Myl. & Cra.* 57; *Bainton v. Ward*, 2 Atk. 172; 2 Ves. 2; 7 Ves. jun. 503 n.; *Lord Townshend v. Windham*, 2 Ves. 1; *Paek v. Bathurst*, 3 Atk. 269; *Troughton v. Troughton*, 3 Atk. 656; *Jenney v. Andrews*, 6 Madd. 264; *Attorney-General v. Statt*, 2 Crompt. & Mees. 124.

(*y*) *Holmes v. Coghill*, 7 Ves. jun. 499; 12 Ves. jun. 206.

(*z*) *George v. Milbanke*, 9 Ves. jun. 190; *Hart v. Middlehurst*, 3 Atk. 377.

who had antecedently any specific estate or interest in the subject of the appointment, but against creditors, who had only a general equity to have what was appointed to a volunteer considered as assets, if wanted for the payment of debts.(a)

13. As we have already seen, in some cases of Crown debts, a power in the debtor, although unexecuted, will enable the Crown to extend the lands, but that is by virtue of the King's prerogative.(b)

14. Notwithstanding the authorities,(c) it is now settled, that even where only a power is given to sell to pay debts, and although the power is given expressly or by implication to the executors, the proceeds of the sale are equitable and not legal assets.(d) It is not necessary that *the descent should [*29] be broken. A mere charge of debts clearly constitutes equitable assets;(e) and as a power to sell to pay debts really creates a charge in equity on the estate, the same rule has properly been applied to all the cases.

(a) See 1 Mer. 638, and *supra*, ch. 6.

(b) Vide *supra*, ch. 5, sect. 2.

(c) See 1 Bro. C. C. 140 n.

(d) *Newton v. Bennet*, 1 Bro. C. C. 135; *Barker v. Boucher*, ib. 140 n. See *Clay v. Willis*, 1 Barn. & Cress. 364; 2 Dowl. & Ry. 539; *Barker v. May*, 9 Barn. & Cress. 489; 4 Man. & Ry. 386.

(e) *Bailey v. Ekins*, 7 Ves. jun. 319; *Shiphard v. Lutwidge*, 8 Ves. jun. 26.

SECTION IV.

OF THE OPERATION OF ESTATES CREATED UNDER POWERS ON THE
ESTATES IN SETTLEMENT.

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|--|---|
| 2. Revocation determines uses without entry, &c. | 25. Operation of powers as between each other. |
| 3. Appointment defeats the estates limited, in default, including dower. | 26. } Jointure 1st. Portions 2d. |
| 5. Operation of 3 & 4 Will. 4, c. 105, on dower. | 27. } Lease not defeated by a revocation. |
| 6. So an appointment defeated a judgment. | 28. Sale does not defeat a lease. |
| 7. But by 1 & 2 Vict. the judgment is a charge. | 30. Where the second appointment overreaches the first. |
| 9. Sale and exchange defeat all the estates except leases. | 32. Mr. Butler's view. |
| 12. Partition has the like operation. | 33. Mr. Saunders' and the Author's views. |
| 13. Leases in possession overreach all the estates. | 34. Operation of partial and repeated executions of revocation and new appointment on the previous estates. |
| 14. Although the donee does not take the first estate. | 35. Adams v. Adams. |
| 16. Jointures overreach all, so as to operate on the husband's death. | 36. Points of law decided by it. |
| 20. Even where equity aids a defective execution. | 37. Brudenell v. Elwes. |
| 21. Portions also take precedence of estates in settlement. | 38. Powers of sale and exchange not always defeated by a new settlement. |
| | 39. Phelp v. Hay. |
| | 40. Total revocation by the context. |

1. ALTHOUGH every power operates as a power of revocation and new appointment, (f) yet in order to enable us to [*30] consider accurately the effect of the execution of powers on the estates in the settlement, we must here distinguish three kinds of powers; viz., first, a power of revocation; secondly, a power of appointment with a limitation over in default of appointment; and, thirdly, particular powers in a settlement, as powers of leasing and jointuring.

2. And first, as to a power of revocation: Immediately upon the execution of it the ancient uses are determined, whether limited to a subject or to the King, (g) without entry or claim, if the party who has the power is himself tenant of the freehold, as he

(f) See Tarback v. Marbury, 2 Vern. 511.

(g) 1 Jo. 193. See Reeve v. Attorney-General, 2 Atk. 223: as to trustees, see 4 & 5 Will. 4, c. 23.

cannot enter upon himself; and a claim is unnecessary; but it has been doubted whether a claim is not necessary where the revoker has no interest in the land. *(h)* The revocation and new appointment are not in law a new alienation, but the appointee is in under the original settlement, and therefore, under the old law, if the tenure had been in *capite*, a new fine would have been payable upon the revocation and new appointment; *(i)* for although the tenant altered the old uses and declared new, and thereby altered the King's tenant, yet as the King had given license to alien to the persons in whom the seisin was vested, out of which alienation all the uses as well future or present, as out of one and the same fountain, arose, and they all sprung out of the conveyance as out of one root, for this cause there needed no new license for limitation of any new use rising out of the settlement.

3. Secondly, as to powers with estates limited in default of their being exercised. Immediately upon the execution of such a power the estates limited in default of appointment cease, and are defeated; and the estates limited under the power take effect from the time of the execution of the *power, in [*31] the same manner as if they had been contained in the deed creating the power. The estates, however, limited in default of appointment, are, as we have seen, vested estates. *(k)* Therefore, where an estate is limited to such uses as a man shall appoint, and in default of appointment to him in fee, as he is seised in fee until appointment, his wife becomes dowable; and it was formerly doubted whether a subsequent appointment would drive out the wife's right of dower. *(l)* It was to prevent this question from arising that in the limitations to bar dower an interposed estate was given, in default of appointment to a trustee. There are few points upon which a greater difference of opinion has prevailed in the Profession. It was formerly much debated whether the fee was vested in the party, but that question is now at rest. Some opinions have taken a distinction between a limitation in default of and *until* appointment, and a limitation merely in de-

(h) Digges's case, 1 Rep. 173, 5th resol.; Mo. 605; Co. Litt. 237 a; and see Vernon's case, Mo. 744; Doe v. Haddon, 4 Mann. & Ryl. 118.

(i) Lord Montague's case, 6 Rep. 27 b.

(k) Supra, sect. 1.

(l) See n. (2) Co. Litt. 216 a.

fault of appointment; in which last case, it has been contended, the fee does not vest; this doctrine, however, cannot be supported at the present day. It must be taken as a settled principle that the fee is vested in the husband, and the right of dower has attached. And the opinion of most of the eminent men of the times, and amongst them of the late Mr. Fearn, was, that the right of dower was defeated with the estate on which it attached by the execution of the power. Upon principle, it is difficult to frame a reason in favour of the right of dower; for although the estates limited by the execution of the power take effect only from the time of the execution of the power, yet the estates limited in default of appointment cease the instant before the new uses arise.(I) Perhaps the doubt may have been raised on this ground, that as a conveyance of the fee would in fact destroy the [*32] power, a partial charge or right attaching on it, even by operation of law, must have the effect of defeating the operation of the power *pro tanto*. The opinions of the Judges on this point stands thus: In *Cave and Holford*, Mr. Justice Heath expressed an opinion, that the power would enable the donee to bar the claim of dower.(m) In *Cox and Chamberlain*, Lord Alvanley spoke rather dubiously of the question. He said, that by the execution of the power the estate in fee might be superseded, "though perhaps not to bar dower." Lord Eldon appears to have thought with Mr. Justice Heath, that the appointment drove out all intermediate estates, and the dowress could not sustain her claim of dower upon the new estate in the appointee of the power.(n) In a later case Lord Eldon said, that notwithstanding his own opinion, if the point had arisen, he would have permitted the party to take the opinion of a Court of Law upon it.(II)

4. In the late case of *Moreton v. Lees*,(o) the point was decid-

(m) See 3 Ves. jun. 657.

(n) See *Maundrell v. Maundrell*, 10 Ves. jun. 246.

(o) *C. C. Lancaster*, March Assizes, 1813, upon a special case before Richards, C. B. and Wood, B.

(I) The doubt could scarcely be supported on *Buckworth v. Thirkell*, Coll. Jurid. 332, 3 Bos. & Pull. 652 n., if even that case itself had been rightly decided. See *Moody v. King*, 2 Bing. 447, and qu.

(II) The case of *Wilde v. Fort*, 4 Taunt. 324, may be treated as an authority in favour of the right of dower; but it is not stated whether Halliday executed his power or conveyed his estate. If the latter, of course the point did not arise.

ed against the right of dower. The widow brought her writ of dower, and the defendants pleaded that the husband was only seised by virtue of a feoffment, dated 12th March 1787, whereby the estate was granted to the husband and his heirs and assigns, to such uses as he should appoint by deed or will; and for want, or in default of, and in the mean time, and until appointment, to the use of the husband, his heirs and assigns forever; and they also pleaded an appointment in fee by him; a verdict was found for the plaintiff, subject to the opinion of the Court, and the Court, upon argument, decided against the widow's right; and *the point was decided the same way in the later case of [*33] Ray v. Pung, which sets the point at rest.(p) The certificate in that case was confirmed by the Vice-Chancellor.

5. This point is now only important as a question of construction applicable to like cases, and as regards women married before the 1st Jan. 1834, for in other respects the Act of 3 & 4 Will. 4. c. 105, has placed a woman's dower entirely in the power of her husband by act *inter vivos*, or by will, or by a simple declaration by deed or will.

6. Upon the same principle upon which dower was held to be excluded by an appointment, it was decided that a judgment against the party having a power of appointment, with the estate vested in him until and in default of appointment, was defeated by the subsequent execution of the power in favour of the mortgagee.(q) The Court, in delivering judgment, said, that it had been established ever since the time of Lord Coke, that when a power is executed, the person taking under it takes under him who created the power, and not under him who executes it. The only exceptions are, where the person executing the power has granted a lease or any other interest which he may do by virtue of his estate, for then he is not allowed to defeat his own act. But suffering a judgment is not within the exception, as an act done by the party, for it is considered as a proceeding in *inritum*, and therefore falls within the rule. And it is immaterial that the purchaser had notice of the judgment,(r) and that a portion of the purchase-money was set aside as an indemnity against it.(s)

(p) 5 Barn. & Adol. 561; 5 Madd. 310.

(q) Doe v. Jones, 10 Barn. & Cress. 459; Tunstall v. Trappes, 3 Sim. 300.

(r) Eaton v. Sanxter, 6 Sim. 517.

(s) Skeeles v. Shearly, 8 Sim. 153; 3 Myl. & Cra. 112.

7. But this is altered by a late act,^(t) which makes a judgment an actual charge on the debtor's property, where he has at the time of the judgment entered up, or at any time afterwards, any disposing power over it, which he might, without the [*34] assent of any other person, exercise for his 'own benefit; so, that although the execution of the power were still to have the same operation, yet the judgment, by reason of the power itself, would be binding.

8. Thirdly, in regard to particular powers in a settlement as powers of leasing, jointuring, charging with portions for younger children, selling and exchanging, &c., these we may consider under two views: 1st, with respect to the operation of the powers on the limitations in the settlement, and 2dly, in relation to their effect on each other. And first,

9. Powers of sale and exchange, as their very object points out necessarily roots out all the estates in settlement, except so far as any estate is protected by the intention of the instrument creating it, or, which properly belongs to the next branch of our inquiry, where leases have already been granted under powers in the settlement. Of course the estate for the maintenance and benefit of which they were granted, will remain subject to them just as if it had been liable to them *before* the power was created. The estates and interests thus defeated are of course transferred to the estates to be purchased with the moneys produced by the sale, or to the estates taken in exchange.

10. Of course at law whatever interests are conveyed by the settlement creating the power, will be defeated by the exercise of the power, although a question may arise in *equity* whether the power was properly created. The case of *Fry v. Fish*, which will be cited in another place,^(u) is an instance of this: no one doubted that the power was capable of being executed at law, but the question was whether, as the daughter was tenant for life in remainder, a present power of sale ought to have been created; but as the mother's life estate was comprised in the settlement, it was supported, for a sale would not accelerate the interests of

(t) 1 & 2 Vict. c. 110, s. 13.

(u) *Infra*, ch. 18.

the parents by turning a remainder into a possession at the expense of the issue, but they would have to wait for their *beneficial interest until the death of the mother, when [*35] the remainder, if the estate had not been sold, would regularly have fallen into possession. Both this case and the case of *Fox v. Prickwood* prove that, although the power is vested in a tenant in remainder, yet if from the intention expressed or implied its immediate execution is not restrained, it will overreach the estates in the settlement *prior* to that of the donee of the power.

11. So in *Dike v. Ricks*(x) the testator devised to his wife for life, and he appointed that if his personal estate proved insufficient to pay his debts, and maintain her and her children, then she should sell all the estate, or so much as should be necessary. She sold the fee, and conveyed it by bargain and sale, "and where it was said that this sale shall be *quoad* the estate for life only, which is transferred by the statute, and the reversion was conveyed by the will, it was held, that when she took upon her to sell she sold the entire estate and inheritance of the land, wherein the estate for life is contained, and she did not by authority of the will convey the reversion only expectant upon the estate for life." (1)

12. Partition depends upon the same principles as a sale or an exchange. Therefore where a man under a power in the settlement of an undivided share made a charge in favour of his own executors, and then under another power joined in a partition, and did not disclose the appointment, and a divided portion was conveyed to the uses of a settlement, it was held that the charge under the power operated over the portion so settled.(y) The Court observed that doubtless the uses were revoked, and the power under which the charge was made; but the revocation was under a "power given by the settlement, the [*36] true object of which was not to destroy any of the uses, but to shift them with all their consequences to the new estates, to be purchased in consequence of the revocation, it being merely for

(x) Cro. Car. 325.

(y) *Earl of Uxbridge v. Bayley*, 1 Ves. jun. 499; 4 Bro. C. C. 13.

(1) *Lewthwaite v. Clarkson*, 2 You. & Coll. 372, was a case of no difficulty, but the marginal note is wrong, and calculated to mislead.

the purpose of selling the estates and buying others to the same uses, or for the purpose of a partition, but without any intention to make any serious alteration in these uses. That being so, considering the meaning of the original deed, and of the subsequent deed having that sole operation to convert the undivided part into separate property, and to lay all the charges which were upon the undivided part upon that which was to be taken in the room of it, they thought the uses and powers under them ought to attach themselves to the newly acquired estate, exactly as they stood upon the original estate, without any alteration in the interest of any.

Upon the form of the conveyance of the separate portion, the Court observed, that the new estate was limited to the same uses to which the undivided part was limited by the original settlement. The word "charge," to be sure, was not used, but the word "use" was. Whenever parties have power by deed to do a particular act, when done under the power, it is as if incorporated in the original deed when executed; therefore, when the second limitation was to the same uses as the original deed this might properly be termed a use, for it was an interest growing out of the original power.

13. It holds generally true, that a power to create leases to take effect in possession, will control and overreach *all* the powers and estates in the settlement.(z) Thus, in a case(a) where lands were settled to A. for life, then to trustees for a term, ['37] upon such trusts as A. should direct, and "then to uses in strict settlement, with a power of leasing to A.; A. first declared the trusts of the term for payment of his debts, and then granted a lease in exercise of his power. It was objected, that the estate was bound by the declaration of trusts by A., and that he could not afterwards execute his power, so as to overreach the term; but this was overruled; "for the term was originally subject to the power, being contained in the same deed, and he having exercised his power, the leases are precedent to the term, and control it."

14. So where an estate was limited to a stranger for 15 years

(z) See the argument of Bridgeman, Chief Justice, in *Bosworth v. Farrand*, Cart. 111; and see 2 Ro. Abr. 260, pl. 5; S. C. Cro. Jac. 347, nom. *Fox v. Prickwood*.

(a) *Talbot v. Tipper*, Skin. 427; *Doe v. Thomas*, 9 Barn. & Cress. 288.

for a valuable consideration, remainder to the owner for life, with a power to make leases in possession, it was held, that he could make leases before his estate fell into possession by the expiration of the fifteen years ;(b) for in construction of law the lease precedes all the particular estates, and is taken as if the use had originally been limited to the lessee, and after to the uses of the settlement, that is, the other uses in construction of law follow it ;(c) and *Bridgeman, C. J.*, laid it down, that where powers are to be put in execution to take effect subsequently, and to stand charged with estates made by those who claim under the limitations of the uses in the conveyance, there ought to be express words for it, and so had been in all conveyances he ever saw, for otherwise it was contrary to the nature of the power, which is understood to have its essence from him who created it, and in construction of law to precede the limitation of uses.(d)

15. Again(e) where an estate was limited to a mortgagee for 1,000 years, remainder to A. for life, with remainders over, and A. had a power to lease in possession, to take effect *from the date of the deed, or the day of her death, and [*38] she exercised the power by creating a lease to commence from her death, it was held that the lease took precedence of the 1,000 years' term.

16. The same rule prevails where any other estate is authorized to be raised by a power, and from the nature of the interest to be raised is to take effect in possession, or next after the estate of the donee of the power. Therefore jointures, like leases will supersede all the estates in the settlement which would prevent the jointress from taking her jointure upon the death of her husband, which is the period at which it should arise ; for powers to jointure, like powers to lease, take precedence of all the estates in the settlement, unless it be otherwise provided by the instrument creating the power.

17. Thus in *Sandys v. Sandys*,(f) where in a strict settlement on a marriage a term of years was created in remainder, to raise

(b) *Fox v. Prickwood*, 2 Bulstr. 216; 1 Ro. 12; Cro. Jac. 349; 2 Ro. Ab. 260, pl. 5.

(c) *Whitelock's case*, 8 Rep. 71 a; *Bridg. by Ban.* 164.

(d) *Bridg. by Ban.* 176.

(e) *Rogers v. Humphreys*, 4 Ad. & Ell. 299.

(f) 1 P. Wms. 706. See *Bradbury v. Hunter*, 3 Ves. jun. 187. 189. 260.

portions for daughters in default of issue male, with power for the husband to make a jointure on a second wife, although the issue male of the first marriage having failed, it was held that the portions were raisable out of the reversionary term by sale or mortgage, yet the decree was to be subject to the father's power of making a jointure on a second wife.

18. So in *Carter v. Carter*, (g) a settlement was directed to be made upon one for life, remainder to his sons in strict settlement, remainder to trustees for fifteen years, for raising portions for daughters, and a power to the father to make a jointure, which he exercised by appointing the whole profits. The Master of the Rolls observed, that the term was not to commence until after the death of the wife : for the father having a power given to him to limit a jointure, and he having executed that power, lets loose this estate for life precedent to the estates to his first [*39] and every other son, and *this term being subsequent to those limitations, must be postponed to the jointure. In a case (h) before Lord Hardwicke, where, by will, portions were provided for the testator's son's daughters, with a power to him to make a jointure, and he appointed the whole estate to his wife, Lord Hardwicke said, that as to the jointress it was very clear that the portions under a term created by the will could not be so raised as to affect her, for if the jointure had been limited by the will itself there could have been no doubt, and it was certainly the same thing when it was done by a power : and when the husband executed it the estate arose out of the will, and consequently was precedent to the term for raising portions.

19. In a later case (i) the devise was to the testator's son for life, with remainder to his sons and daughters in strict settlement, and failing such issue he willed that the estates should stand charged with and be subject to the payment of 500*l.* a-piece to certain children, which he willed should be raised *and paid to them within six months after the death of the son, without issue*, and subject to such charge to A. for life, with remainders over, with a power to the son, if he should marry, to make a jointure of all or any part of the estates. The son exercised the power, and the Lord

(g) *Mosc.* 365.

(h) *Hall v. Carter*, 2 *Atk.* 354; 9 *Mod.* 347.

(i) *Reynolds v. Meyrick*, 1 *Eden*, 48.

Keeper said, it was a question of intention. If the testator had said the legacies should be paid within six months after the failure of issue of the son, and were then to be raised, he should have thought it would have over-ruled the jointure, being a charge on that estate, and that the jointress must have kept down the interest for life. But it could not be contended that the jointress was chargeable, and therefore the words "payable within six months after the death of the son" were not absolute words, but must be explained by the context, with this restriction, *there being no jointress then in being*. The words "within six months, &c.," are synonymous to those, "on the estate to A. [*40] coming into possession." But after he had used these words he gave the power to jointure, and postponed the payment to another estate.

20. And of course if the power to jointure be defectively executed, but the defect is aided in equity in the wife's favour, the jointure will equally prevail over the portions. (*k*)

21. The like rule in general applies to *powers* to raise portions, which, where they are not restricted by other powers in the same instrument, will enable the donee to charge them so as to take precedence over the estates in the settlement; but whether they will displace a jointure is a doubtful point.

22. In a case where the settlement was to A. for life, remainder to such woman as he should marry, for life, remainder to the first and other sons in tail, remainder to A. in fee, with a power to him to charge portions for younger children, which he afterwards duly exercised: it was prayed that the remainder only might be charged with the portion; but the Court held, that the power and the charge made pursuant thereto did affect the wife's estate for life as well as the remainder; and that it was like a power of leasing, which over-reaches all the estates, for which reason the Lord Chancellor said it was usual to insert a proviso in such power of charging, that it shall not prejudice the jointure or other preceding estates. (*l*) The decree was for low rates of interest for different periods, till the portions were payable. Upon a rehearing before Lord Cowper, on account of the rate of

(*k*) Churchman v. Harvey, Ambl. 339, and App. I. p. 824, Blunt's edition.

(*l*) Beale v. Beale, 1 P. Wms. 244.

interest, (m) he said that the former decree was rather a recommendation to the mother to make them the allowance, than a decree to charge her jointure therewith, but he must now give them no more than what in strict justice they deserved, and that since the portions were not payable till eighteen or [*41] marriage, they could not charge the jointress with interest thereof in the mean time, but that the reason of postponing the payment thereof till that time being in favour of the jointress, she ought to maintain them out of the profits of her jointure lands, but in regard the portions could not in strictness carry interest till they became payable, they should be allowed full interest from that time; and whether the portions, on the daughter's attaining eighteen or marriage, should be immediately raised, so as to charge and affect the jointure estate for life, or wait till her death, he said it would be time enough to consider of that when that came to be the case. The judgment is somewhat ambiguous, but Lord Cowper appears to have differed from Lord Harcourt. If the rule is universally in favour of portions, there is no distinction between a jointure and portions; but either when raised by means of a power, will prevail over the other, if actually created by the settlement itself. There would, however, be no difficulty in drawing a distinction between the two charges which is pointed out by their nature. Where they come in competition, the jointure should precede the portion. Where *both* are created under powers, and although the portions are first charged, a jointure would, it is apprehended, prevail over portions. Upon the same principle a jointure, although limited by the deed creating a power to charge portions, might be allowed to prevail over the portions when charged. The proper place in the settlement in which to insert such a charge is after the life estate of the father, and subject to the jointure of his wife; for such is the position assigned to it in all settlements.

23. In the case of *Mosley and Mosley*, (n) where there was no conflict with a jointress, under a strict settlement by a father and his eldest son, terms of years were created to raise portions for the father's younger children. And powers were given to the son, subject to his father's life-estate, to direct portions

(m) Gilb. Eq. Rep. 93; Prec. Cha. 405.

(n) 5 Ves. jun. 248.

*to be raised for *his* younger children. These powers [*42] were executed, and the father's younger children insisted that their portions were a prior incumbrance, as they were created by the settlement, which were executed long prior to the deeds executing the powers. But Lord Alvanley, then Master of the Rolls, held otherwise. He said that the moment the power was executed it was as if in the original deed, and in that way it would stand now. This power was subject to the father's life-estate; therefore it must be taken as if made subsequent to the life-estate of his father. As soon as he has executed that power, the term created by it comes in immediately after the estate of the father, before the other terms, but not before his life-estate. The charge, therefore, is the first incumbrance upon the estate. Suppose the power was not for a provision for younger children, but to secure a jointure to his wife: according to the defendants, that jointure would be postponed to his younger brother's fortunes. What pretence is there for that? The moment he raises the term, it is put in after the life of his father, to which the power is subject. He could not, he added, in point of conveyancing, put it in any where else.

24. We may perhaps here notice a late case, where there was a strict settlement, and the ultimate limitation was to the use of the settlor in fee, "subject nevertheless, and charged with the payment of 6,000*l.* as he should appoint." It was insisted by the bill, but not relied upon in argument, that the power only operated as a charge upon the ultimate reversion. The Master of the Rolls held, that upon the true construction the reservation of the right to charge must extend to the estate in all the limitations of it and not be confined merely to the reversionary interest limited to himself, over which he would have a disposing power at *allevents*.(o)

*25. Secondly, Where several powers have been given [*43] by the same deed, and two or more of them are executed, and no provision has been made in regard to their priorities, the

(o) *Stackhouse v. Barnston*, 10 Ves. jun. 453. See *Forster v. Graham*, 2 Str. 961. 2 Barn. B. R. 341. 428; see *Simpson v. O'Sullivan*, 3 Dru. & War. 446.

intention of the settlement and the object of the powers must be the best guides to the construction.

26. In *Edwards v. Slater*, (p) in a settlement by a fine, the settlor was made tenant for life, and it was provided that if he should make a jointure to his wife, and make a lease for thirty-one years, to commence after his death, or the raising of 3,000*l.* for his daughters' portions, then the conusees of the fine should stand seised to those uses. He made a jointure pursuant to his power, and then made a lease for thirty-one years, to begin after his death, for raising the portions. And the two powers were held consistent; for during the continuance of the jointure the lease shall not take effect in point of interest, but shall go on in time, and the residue of the term that remains unexpired after the death of the jointress shall take effect in interest, and no more.

27. In the case of *Yelland and Fielis*, (q) Coke, Chief Justice, laid it down, that if one make a conveyance, with a power to make leases and a power of revocation, if he make a lease (l) he may afterwards revoke for the *residue*. Indeed, it could not be argued that the interest of a lessee, who is considered a purchaser *pro tanto*, would be defeated by the subsequent execution of another power by the lessor. It were not easy to lay down any abstract proposition on this head; but questions upon it seldom occur. The *dictum* in *Moore* is perhaps the only observation in the books on this point. The nature of the powers, in most instances, sufficiently points out the priority to which the estates created under them are entitled. Thus a power

[*44] of sale must defeat every limitation of the estate, whether created directly by the deed, or through the medium of a power, except estates limited to persons standing in the same situation as the purchaser; for example, a lessee, for the very object of a power of sale is to enable a conveyance to a purchaser discharged of the use of the settlement, and it is immaterial whether any particular use was really contained in the original settlement, or was introduced into it in the view of the law

(p) Hard. 410.

(q) Mo. 788.

(l) Viner, who inserts this *dictum* in his Abridgment, after this word "lease," adds the word [of part] between brackets. There is no pretence, however, for this interpolation.

by the execution of a power contained in it. The same principle applies to a lease. As to powers executed in favour of the family, a jointure, whether created before or after a provision for the jointress's younger children, ought to take precedence of it; but they must both give way to a subsequent execution of a power to sell and exchange, or lease. As we have seen, the jointure and portions will be transferred to the new estates under the usual powers in settlements, and the leases will operate for their benefit. If a tenant for life had a power to charge a sum generally, and also powers to sell and exchange, and lease, &c. it is said that the use or estate appointed by either of those powers would vest in the appointee in possession, and no subsequent act of the tenant for life could defeat his own previous appointment, in favour of a purchaser. If the subsequent could defeat the previous appointment, the appointee under the previous appointment would not take an estate in possession according to the express purport of the appointment.^(r) But this cannot be considered a general rule, for in some cases the charge appointed may be defeated by an exercise of the power of sale, and transferred to the estate to be purchased in lieu of it.

28. In a late case,^(s) where under the will the tenant for life had a power of leasing, and the executors had a power to sell or mortgage, although it was held that an exercise of the latter power overreached the life-estate, and all estates created by way of interest out of it; yet it was assumed, both at [*45] the bar and by the bench, that a lease granted by the tenant for life under his power, before the exercise of the power by the executors, had continuance *after* a mortgage executed under the latter power; and it was held that the mortgagee took the immediate reversion expectant upon the lease.

29. Where there is a term to raise portions as the father shall appoint, and he has also a power to jointure, if the latter power is exercised it will, as we have seen, override the term; and it is immaterial that an appointment be made of the portions before the jointure was appointed.^(t)

(r) 1 Sand. on Uses, 161, 3d. edit.

(s) Bringlee v. Goodson, 4 Bing. N. C. 726.

(t) Carter v. Carter, Mose. 365. There the term was after the estates tail to the sons; vide *supra*.

30. We may here observe, that where a party having two powers, for example, to charge portions and to lease, executes one power, leaving the other in operation, the exercise of the latter *may* supersede the estate actually first appointed, just as if it had been contained originally in the settlement creating the powers. This must depend upon the nature of the powers.

31. Thus in *Doe v. Thomas*(*u*) a woman was tenant for life under a settlement, with power to charge an annuity for any husband she might marry, and also portions for her children, and also a power to lease for twenty-one years: she upon her marriage exercised the two first powers, and using both words of leasing and appointing, limited the estate to trustees for 500 years, *from thenceforth next ensuing*, to raise the portions immediately after her decease, or in her life-time with her consent. She then granted a lease under the power. The question was whether the lease over-reached the term. The Court were of opinion that it did. If they were to hold that the term which was vested in the trustees was to be the first legal estate uncontrolled by any other matter,

the leasing power would be null and void, because the [*46] person in whom the term was vested might then at any time turn out the lessees. In order to avoid that inconvenience, and to give effect at the same time to the whole import of the instrument, the leasing power must be considered as controlling and superseding the term, which ought not to have effect until the period when the trustees call that term into action. When they have called that term into action the leasing power would be put an end to.(*x*) but until that be done the term must be considered as subservient to the leasing power.

32. Upon the subject we have been discussing, Mr. Butler, in one of his notes on *Co. Litt.*(*y*) observes that it often happens that the same deed contains several powers, and supposing all or even more than one of them to be executed, there is at least ground to argue that, generally speaking, the use limited by the power last executed will take place of all the uses created by the powers previously executed, unless the contrary is expressed or

(*u*) 9 Barn. & Cress. 288. These appear to be the facts, but the case is not accurately stated in the Report.

(*x*) *Qu.* and consider the point.

(*y*) 271 b. III. 4.

implied in the deed. He then refers to the passage in Moore, and adds, that it is to be observed that where a power is exercised for a valuable consideration, in such a manner as shows it to be the intention and agreement of the parties that the use created under it should not be over-reached by the execution of another power, it is contrary to equity that it should be thus over-reached; and consequently the unexecuted powers may be so far affected both at law and in equity, as to be subject to the use created under the executed power. To avoid all disputes upon these heads, he recommends provisions in settlements, declaring, where there is no contrary intention, 1. that all the powers of charging with money should be subject to the provisions for the wife and children: 2. that none of the uses should be exempted from the exercise of the powers of sale and exchange, except the leases, and that the provisions for the wife and children should be subject to the leases; 3. that the powers of sale and exchange should be subject to mortgages pre- [*47] viously made, but may be exercised with the consent of the mortgagees.

The rule, we have seen, depends principally upon the nature of the powers. The proposed declarations only perform the office of the law.

33. Mr. Sanders on the same subject has observed (z) that so early as the time of Bridgeman's practice a doubt seems to have prevailed as to the priority and effect of powers of the above kind, with reference to each other, when contained in the same settlement; and he (Bridgeman) therefore introduced a clause in settlements, declaring, "that every of the said jointures, leases, grants, limitations and estates, shall take effect and stand good according as the said jointures, &c. shall in priority of time be made one before the other, by force of any of the powers aforesaid." The qualifications, however, as far as he had been able to ascertain, appeared to have been subsequently omitted in most approved forms, thereby leaving the effect of the powers to the construction of law; but of late years it had not been unusual to insert a proviso, declaring, 1st. that the power of leasing shall take precedence of the power of selling and exchanging, unless

(z) Uses, vol. 1, p. 164.

executed subsequently to it in point of time; 2dly, that the power of selling and exchanging shall over-reach every other power, although subsequently exercised in point of time; and, 3dly, that in all other cases the powers shall take effect according to the execution of them in priority of time. He then states his opinion that any explanatory declaration is neither necessary nor proper.

Admitting the propriety of expressly declaring the intention of the parties, both of the qualifications above noticed, he adds, are imperfect and erroneous; in which observation he appears to be perfectly correct. The following plan appeared to him less objectionable: in the power of sale the releasees or the tenant

for life may be empowered to revoke the uses limited by [*48] the settlement, and which may be limited by the exercise of any of the powers therein contained, except any lease made under the power of leasing, and subject and without prejudice to any sale or mortgage which shall then have been actually made in consequence of the exercise of any of the powers: and in the power authorizing the tenant for life to charge for younger children's portions, it should be expressly stated that the charge made under the power should be subject to the jointure limited by virtue of the power of jointuring reserved to the same tenant.

To this there can be no objection, but the general practice has been to leave it to the law to declare how the appointment under the powers should operate; and as we have already seen, it is seldom that any real difficulty can arise in establishing their priorities.

34. In considering what powers may be reserved by a donee of a power, at the time he executes the original power, we were led to examine the effect of a bare revocation under a power to revoke so reserved. But we have still to consider the effect of partial and repeated executions of powers to revoke, and limit new uses upon the estates previously created; that is, which of the previous estates remain capable of taking effect.

35. The leading case of *Adams v. Adams*(a) requires a full

(a) Cowp. 651. There is no marginal abstract of the case.

investigation, in order to ascertain what it decided. The report requires some application to comprehend it.

By a settlement of 3d Nov. 1758, an undivided moiety of an estate was conveyed to such uses as Mr. and Mrs. Adams should jointly appoint, and in default of appointment, to him for life, remainder to her for life, with a limitation to a trustee to preserve contingent remainders, remainder to such child or children of them as they or the survivor should appoint, and in default of such appointment, to their first and other sons successively in tail, remainder to their daughters as tenants in common in tail, remainder to such uses as Mrs. Adams should ap- [*49] point, and in default of such appointment, to her right heirs.

By a joint appointment of the 29th Nov. 1758, Mr. and Mrs. Adams appointed their moiety to him for life, remainder to her for life, with a limitation to trustees to preserve contingent remainders, remainder to such child or children of them as they or the survivor should appoint, and in default of such appointment, to all such children living at the death of the survivor of them, as tenants in common in tail, with cross remainders amongst them, remainder to Mr. and Mrs. Adams and the survivor, and the heirs and assigns of the survivor, and with a power to them jointly to revoke the uses, and limit new ones.

By an agreement of the 24th Sept. 1764, between Mr. and Mrs. Adams and the owners of the other moiety, it was agreed that certain of the entire estates should be conveyed to the uses of the 3d Nov. 1758, the subsequent appointment not being noticed.(I)

By a deed of the 20th Oct. 1764, which recited the settlement of the 3d Nov. 1758, but not the subsequent appointment, the owners of the other moiety accordingly conveyed it to certain uses, being the same uses as were declared by the settlement of the 3d Nov. 1758, of the moiety thereby settled.

Mr. Adams died, leaving his wife, and a son and two daughters by her.

By a deed of 4 July, 1767, which recited the settlement of the 3d Nov. 1758, and the deed of the 20th Oct. 1764, *and also that*

(I) It is not stated whether this agreement was executed in the manner required by the power, or not.

by the deed of the 29th Nov. 1758, the estate there stood limited to the uses therein mentioned, and that no other appointment had been executed; Mrs. Adams appointed both of the moieties to her two daughters for 500 years, redeemable by the son [*50] upon payment to the daughters of £3,000/ each, remainder to the son in fee, with a power to her to revoke and limit new uses.

By a deed of 25 Oct. 1771, which recited all the deeds, Mrs. Adams appointed one moiety to her daughter Mary for life, remainder to her children in strict settlement, with like remainders to her other daughter and her children; and she appointed the other moiety to her other daughter for life, with remainder to her children in strict settlement, with like remainders to her first-mentioned daughter and her children, with a like power of revocation and new appointment to herself, which she did not exercise.

The question was, what estate did the son take? He desired to set up the appointment of July, 1767. It was agreed that the appointment of 1771 was void *pro tanto* as an excessive execution—grandchildren not being within the power. It was contended that the son either took the fee under the appointment of 1767, or that he took an estate tail subject to the life estates of his sisters; which latter point was supported on the ground, that the deed of 29 Nov. 1758 was revoked by the agreement of Sept. 1764, and that by that agreement and the deed of 20 Oct. 1764, the first deed of 3 Nov. 1758 was revived.

The Court were of opinion: 1, that the deed of the 29th of Nov. 1758 was revoked by the subsequent instruments of Sept. and Oct. 1764.

2. That the appointment of 4 July, 1767, was revoked by the deed of 25 Oct. 1771.

3. That the appointment by the last deed to the grandchildren was bad.

Therefore as there was no [valid] appointment of the inheritance, that the son took an estate tail subject to his sisters' life estates, with remainders over, under the deeds of 24 Sept. and the 20th Oct. 1764: and which limitations seemed agreeable to the intention of the parties when they executed the first deed of the 3d Nov. 1758.

*36. Now the points decided by this important case [*51] were,

1. That the agreement (I) and deed of partition operated as a constructive revocation of the appointment of the 29th Nov. 1758: neither of those instruments noticed the appointment, and the original and newly acquired moieties were both limited to the uses of the settlement of the 3d Nov. 1758.

2. That the appointment of July, 1767, to the son in fee, subject to the term for securing portions to the daughters, was absolutely revoked by the appointment of 1771, although the latter deed did not expressly revoke the former uses, and the new uses appointed by it, beyond the life estates to the daughters, were void.

3. That subject to the valid appointment to the daughters for life, the estate vested in the son in tail, according to the uses in the settlement of 3 Nov. 1758. This is an important point. The original limitations were to such of the children as the parents or the survivor should appoint, and in default of appointment, to the first and other sons in tail, &c. The uses were altered by the appointment of 29 Nov. 1758, and in default of appointment to the children, the estate was limited to all the children who should be living at the death of the survivor of the parents, as tenants in common in tail. That appointment was held to be constructively revoked by the deeds of partition. The estate then again stood limited, in default of appointment, to the sons in tail. Mrs. Adams, however, by the appointment of 1767 appears to have recited the appointment of 29 Nov. 1758, as an *existing* appointment, but limited the estate to the son in fee, subject to the daughters' portions. By the last appointment she newly appointed the estate, and as the new uses were partially bad, the question was to what uses the estate should go, subject to the valid uses. The recognition by Mrs. Adams of the appointment of 1758 was held not to revive it, and as the [*52] appointment of 1767 was held to be wholly revoked, the uses of the original settlement of 1758, as established by the partition deeds, was held to be operative. It was a question of great nicety. The uses of the deed of 3 Nov. 1758 were revoked by the appointment of the 29th Nov. 1758; the latter was

(I) But *qu.* whether the agreement was executed in the manner required by the power.

in its turn revoked by the deeds of partition, which were revoked by the appointment of 1767, and the latter was revoked by the appointment of 1771; yet to the extent of the invalidity of the latter, the uses of the partition deeds were held to be the subsisting ones. The point of law decided appears to be that if there are several appointments under a power in a settlement, which are successively revoked, the estate, as far as it is not well appointed, will go to the uses declared by the original settlement in default of appointment. For although the original settlement had been altered by the first appointment, the latter was restored by the second, viz. the partition deeds; and although those uses had been altered by the appointment of 1767, that appointment had been removed out of the way by the appointment of 1771.

This decision should not be confounded with the cases where there is no power to limit new uses. Here there was a full power but it was to a certain extent badly executed.

37. In *Brudenell v. Elwes*(*b*) the estate was settled on the husband for life, remainder to the wife for life, remainder to the children, as the husband and wife or the survivor should appoint; and in default of appointment, to the first and other sons successively in tail male; remainder to the husband's right heirs. By a joint appointment, a portion of the estate was appointed to a daughter in fee to raise 1,000*l.* for one of the sons, with a power of revocation and new appointment in the husband and wife, and the survivor, amongst the children. The wife, who sur-
[*53] vived, revoked the appointment to the daughter (*but without prejudice to the payment of the 1,000*l.*), and appointed new uses, some of which were void, as not being authorized by the power: and it was decided, that subject to the estates well created by that appointment—being successive life estates to the daughter and one of the sons—the estate went, as in default of appointment, *according to the directions of the original settlement*, viz. to the sons successively in tail male, remainder to the right heirs of the father. The revocation therefore was held to be absolute, although the appointment was only partially valid.(1) The Master was of a contrary opinion; but

(*b*) 1 East, 442; 7 Ves. Jun. 382.

(1) *Cutter v. Doughty*, 23 Wend. R. 522; *Ruth v. Rutherford*, 1 Bailey's Eq. Rep. 17; *Mowatt v. Carrow*, 7 Paige R. 328; *Phillips v. Beall*, 9 Dana's R. 1.

the Court of King's Bench certified in favour of a total revocation, and the Lord Chancellor adopted their certificate.

38. We have already seen that some of the parties entitled under a settlement may (subject to the rights of others) settle their interest and create new powers, and exercise them, and create a new settlement with even powers of sale and exchange, and yet such new settlement will not, contrary to their intention, defeat the power of sale and exchange in the original settlement. The latter therefore may still be exercised so as to defeat all the remaining uses of the original settlement, and all the uses and powers subsequently created. If it is not exercised, the new settlement in its turn will have its operation over the estate in possession.^(c)

39. In *Phelp v. Hay*^(d) a woman having a power to appoint an estate for the use and benefit of herself and her husband, and the issue of their two bodies, in such manner, &c. as she should appoint, and having appointed it to her husband and herself for life, she, by a further deed, after the death of her husband, appointed the estate to herself for life, remainder to the use of her three children, Charles, James, and Jane, or to any or either of them, their, his, or her heirs and assigns, in such manner, proportions, &c. as she should by deed or will appoint, and in default of such appointment, to the use of Charles, [54] James, and Jane, as tenants in common in fee. Charles died under age without issue. By her will, in exercise of the power, she appointed 2,000*l.* for her daughter, and the estate, subject thereto, to James (as it was held) in tail, remainder to Jane in tail, remainder to her (the testatrix's) mother for life, with remainder to her own right heirs. The Court held that all the uses were void beyond the estate tail to the daughter, and that no valid appointment of the reversion in fee having been made the former appointment did, as to such reversion in fee, become absolute, and that under such appointment the reversion in fee belonged to her three children, as tenants in common in fee. Here, it will be observed, by the first appointment the estate was subject to a power limited to her, settled on the three sons in fee, and that fee still took effect as far as the new power was not well

^(c) *Roper & Halifax, supra*, and Appendix 3.

^(d) App. No. 15.

executed. In *Adams v. Adams* the estate was appointed to the children, with a power of revocation and new appointment, and the new appointment made, although partially bad, was held to amount to a total revocation of the first appointment. We have already had occasion to consider the distinction between a power to appoint with limitations until and in default of appointment, and an immediate settlement to uses not preceded by any power, but subject to a power of revocation and new appointment.

40. We may here finally observe, that a revocation, although confined in expression to a particular interest, may upon the context be held to be altogether a substitute, so as wholly to revoke the former settlement.(e)

[*55]

CHAPTER IX.

OF THE EFFECT OF AN EXCESSIVE EXECUTION.

SECTION IX.

OF EXCESS IN THE OBJECTS.

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| <p>3. General intent in a will prevails over particular intent.</p> <p>4. Applies to powers.</p> <p>5. Cy-pres doctrine: Gift to child for life, remainder to his children in tail (not objects), estate tail in child.</p> <p>10. Does not apply where all the issue not intended to take.</p> <p>11. Nor to personalty.</p> <p>12. And confined to wills.</p> <p>14. Limitations to objects good.</p> <p>28. Though with void remainders.</p> <p>15. Rule where the fund is given to objects and to persons not objects.</p> <p>16. If some not within the line of perpetuity, void as to all.</p> <p>20. Contra if given partly to strangers, and excess can be ascertained.</p> | <p>21. Void gift prevents valid gift over from taking effect.</p> <p>24. <i>Doe v. Lord Geo. Cavendish</i> overruled.</p> <p>25. <i>Robinson v. Hardcastle</i>.</p> <p>26. <i>Brudenell v. Elwes</i>.</p> <p>27. Two alternatives, one good may operate though the other bad.</p> <p>29. Remainder good after void gift for life to a stranger.</p> <p>30. Power delegated bad, but a gift to objects in default of appointment valid.</p> <p>31. Unless power is to be exercised for strangers.</p> <p>32. Appointment to an object good and subsequent direction bad.</p> <p>33. Where appointment to a stranger for the object is void.</p> |
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1. THERE are three modes in which a power may be exceeded : First, in the objects, as where a power to appoint to children or

(e) *Angell v. Dawson*, 3 You. & Coll. 308.

nephews is exercised in favour of grandchildren or great nephews. 2ndly, in the interests given, as where under a power of leasing for twenty-one years, a lease is granted for twenty-two years. 3dly, In conditions annexed to the gift, as where the fund is given on condition that the appointee pay a *particular [*56] debt. 2. We have already had occasion to treat of what amounts to an excessive execution of a power, and we have now only to consider the *effect* of the excess.

3. And first, *Where the power is exercised in favour of persons not objects of the power.* It hath before been observed, that a will made in execution of a power must receive exactly the same construction as a proper will. Now it is a rule of law, that where a testator has two objects, one particular, and the other general, and the particular intent cannot be effected unless at the expense of the general one, the latter shall be carried into effect at the expense of the former. This is the case where a man gives an estate to one for life, with remainder to his issue, but the estate is so given that all the issue cannot take unless through their parent. The particular intent is, that the parent shall take only for life; the general intent is, that all the issue take: and in these cases the Court will effectuate the general, at the expense of the particular intent, by giving the parent an estate tail.(I)

4. This doctrine applies with equal force to similar limitations in wills executed under powers. An important question has arisen in relation to it, upon which the Judges have been much divided in opinion. The question is, whether, under a power to appoint to children, an appointment to a child for life, remainder to his children, *who are incapable of taking*, [*57] shall give the child himself an estate tail in order to effect the general intent.

(I) This doctrine appears to have been carried too far. And it is established, that where there is only a *single* intent to create a perpetuity, and not a *particular and general* intent, the Court cannot enlarge the limitation: Thus, where there was a devise to A. for life, and *after him* to his eldest or any other son, during his life, and after them to as many of his descendants, issue male, as should be heirs of his or their bodies down to the tenth generation, during their lives, it was determined that A. took for life only. *Seward v. Willock*, 5 East, 198; *Somerville v. Lethbridge*, 6 Term Rep. 213; and see *White v. Collins*, Com. 298; *Doe and Goff*, 11 East, 668; but where the devise amounts simply to an executory trust, a court of equity may effectuate the intention. See *Humberston v. Humberston*, Prec. Cha. 455; 1 P. Wms. 333; 2 vol. Ca. and Opin. 417; but *Doe and Goff* was denied to be law in the late case of *Doe v. Jesson*, in Dom. Proc.

5. This point first arose in a case, where money was directed to be laid out in land, to be settled, after the death of the husband and wife, to the children of the marriage, as the father by deed or will should appoint. The father, by his will, directed part of the fund to be laid out in real estate, to be conveyed to the use of his daughter, *during her life*, for her separate use, remainder to all and every the child and children of his daughter, as tenants in common. Lord Kenyon, then Master of the Rolls, determined, that in order to effectuate the testator's general intention, the daughter must be considered as taking an estate-tail. (a)

6. In the case of *Griffith v. Harrison*. (b) where the devise was to the wife for life, with an exclusive power of appointing by will to the children, but so as the estate should not be divided, but transmitted entire to his heirs, the wife by will, gave the estate to one of her sons for life, remainder over to his children in strict settlement, and so to her other children and their children successively in like manner; the Judges of the Court of King's Bench were divided in opinion upon the operation of the will creating the power. Lord Kenyon, and Grose, J. agreed that there was an excess in the execution of the power; but they certified, that although the appointment could not, as they conceived, take effect in the particular manner the widow intended, yet her *general* intention being that the children of her several children should take estates of inheritance in tail general, on the death of their respective parents, they thought that that general intention should be carried into execution as far as the power given by the husband

would allow; and, consequently, that the *children* respectively took estates in tail general. This construction they thought fairly warranted by great authorities.

This opinion, we must perceive, accords precisely with Lord Kenyon's decision in *Pitt v. Jackson*. The other two Judges, Ashurst and Buller, did not deliver any opinion on this point, for they thought, on the authority of the *Duke of Devonshire v. Cavendish*. (c) that the power authorized a limitation in strict settlement; but, if it did not, then they thought that it authorized

(a) *Pitt v. Jackson*, 2 Bro. C. C. 51. See *Phelp v. Hay*, App. No. 15, but note, there the devise was to *issue* which may be considered a word of limitation; *Vanderplank v. King*, 3 Hare, 1.

(b) 4 Term Rep. 737.

(c) Vide *infra*, p. 68.

a limitation to the *children during their lives* only. In a prior case, however, Mr. Justice Buller appears to have entirely agreed with Lord Kenyon's opinion in *Pitt and Jackson*.(d)

The case of *Griffith v. Harrison* arose upon a case sent out of the Court of Chancery; and upon the first hearing the Lord Chancellor seemed to think that it was not an estate tail.(e) It does not appear what ultimately became of the case; but, as it was a bill filed against the purchaser for a specific performance, the bill was no doubt dismissed in consequence of the different opinions of the Judges, a purchaser not being compellable to accept a doubtful title.

7. In *Routledge v. Dorril*.(f) Lord Alvanley said that he subscribed to the case of *Pitt v. Jackson*, *as far as it was decided, with regard to real estate settled to a person who was an object of the power for life, with limitations in strict settlement to persons not objects of the power*, for that was decided in *Humberston v. Humberston*.(g) and *Spencer v. Duke of Marlborough*.(h) *Pitt v. Jackson* was, he said, a case of real estate. The first and other sons were incapable of taking as purchasers. Lord Kenyon thought, that as it was perfectly clear it was intended to go to the daughter and her issue, and they could not take as purchasers, to effectuate the general intention of the testator, it should be so moulded, and he relied upon *Chapman v. Brown*.(i) There, according to the report, Lord Mansfield laid [*59] down that doctrine, and he (Lord Alvanley) did not find much objection to it, viz. *that where there is a limitation for life, to a person unborn, with remainder in tail to the first and other sons, as they cannot take as purchasers, but may as heirs of the body, and as the estate is clearly intended to go in a course of descent, it shall be construed an estate-tail in the person to whom it is given for life.*

8. In a case which occurred nearly sixteen years after *Pitt v. Jackson*, Lord Kenyon said, that perhaps no case had carried the

(d) See *Robinson v. Harcastle*, 2 Term Rep. 254.

(e) 3 Bro. C. C. 410.

(f) 2 Ves. jun. 364.

(g) 1 P. Wms. 332.

(h) 5 Bro. P. C. 592.

(i) 3 Burr. 1626.

doctrine farther than he did in *Pitt v. Jackson*, and he knew that great Judges entertained considerable scruples at the time concerning that decision. It went indeed to the outside of the rules of construction, yet still he did not think it was wrong.(*k*) In *Routledge v. Dorril*, Lord Alvanley said that he knew the doctrine in *Pitt v. Jackson* had by very great authorities been questioned. Indeed, although, apparently, the fact is not generally known, the case of *Pitt v. Jackson* ultimately met with no decision. The case afterwards came on to be heard before Lord Rosslyn, and it then appeared, that the children, in default of appointment, were to take estates-tail *under the settlement*. And the Chancellor said, that under the circumstances, and if the necessity of the case obliged the Court to consider how to dispose of this strange execution of the power, he should be very much inclined to adopt the idea Lord Kenyon pursued; but, as the child took an estate-tail under the settlement, he determined that the appointment was void *beyond the life estate*; therefore there was only this difference, that under the original settlement she would have an estate-tail at once, and in this way, an estate for life, remainder to herself in tail, which was the same, for her life-estate was moulded in it.(*l*)

Mr Justice Buller, in a later case, observed that the [*60] grounds on which the Master of the Rolls seems evidently to have gone in this case were decisive, although the expression attributed to him in the report was not accurately taken, namely, that the whole appointment to Mary Smith by the will was void, and yet that she took an estate-tail under it. That determination must have been on this principle, that when there is a general and a particular intent, and the particular one cannot take effect, the words shall be so construed as to give effect to the general intent. The doctrine of *cy pres* goes on that principle. The Master of the Rolls grounded his opinion on the case of *Chapman v. Brown*, where the Court said that as the will could not operate so as to give an estate for life to the unborn son of Reginald, with an estate-tail to his issue, therefore that unborn son should take an estate-tail.(*m*)

(*k*) *Brudenell v. Elwes*, 1 East, 451.

(*l*) *Smith v. Lord Camelford*, 2 Ves. jun. 698; and see *Bristow v. Warde*, 2 Ves. jun. 336.

(*m*) 2 Term Rep. 254.

9. This doctrine rested on high authority. Had Lord Kenyon been Chancellor, instead of Master of the Rolls, the point evidently would have been decided; and, paradoxical as it may appear, his decision at the Rolls, although reversed, was not overruled. The opinions, too, of Mr. Justice Buller, Mr. Justice Grose, Lord Alvanley, and even Lord Rosslyn, all stand in favour of Lord Kenyon's doctrine, and the point has been lately decided in Ireland in conformity with these opinions by the Chancellor in a case not yet reported.

10. But this construction will not prevail unless it will clearly effectuate the testator's general intention. Therefore, in a case (*n*) where the estate was given by a settlement to the children, as the father should appoint, and in default of appointment, to them as tenants in common in tail, with cross-remainders in tail, and the father by his will appointed part of the estate to one of his sons, Henry, for life, remainder to the children of Henry, as he should appoint, it was insisted that Henry should take an estate-tail; and Lord Rosslyn in the course of the argument asked why he could not put that construction on the devise; to [*61] which he was answered, that it was intended that the children (of Henry) should take absolutely, not that it should go as an estate-tail would carry it. It was said, that the principle of all the cases for an implied estate-tail is, that there was a clear *indicium* of an intention that all the issues should take in the course in which an estate-tail would go, but that inference could be drawn from those cases to this, where there was no such indication. Lord Rosslyn, in delivering judgment, adopted these arguments. He said that the case of *Pitt v. Jackson* would not enable him to do the same thing here, for here it was a power to Henry to appoint to children in such shares as he thought fit. No estate-tail was given, nor was any intention of that sort expressed; but the children would take either by appointment, or for want of it, distributively *per capita*. Therefore that did not apply: and he was under the necessity of saying the interests to the children of Henry could not in any respect take effect.

11. The doctrine of *cy pres* does not apply to personalty.(1)

(*n*) *Bristow v. Warde*, 2 Ves. jun. 336.

(1) 1 Story's Eq. Jur. § 291; 2 Id. § 1162-1172. 1176.

It was originally introduced in favour of the testator's intention. If it were extended to personal estate, it would defeat the intent, for it would vest the personalty in the executor, and not in the children on the death of the parent.(o)

12. And the rule is expressly confined to wills. It does not extend to limitations by *deed* only of either real or personal estate. In *Brudenell v. Elwes*(p) Lord Kenyon himself expressly laid it down, that this doctrine of *cy pres* went to the utmost verge of the law, even in the construction of wills, but that it had never been applied to the construction of *deeds*; and he accordingly refused to extend it to a limitation in a *deed* executing a power. In the same case, Lord Eldon observed, that the case did not come near *Pitt v. Jackson*, and the other cases upon wills; first, as they were cases upon wills, not deeds, to which this [*62] doctrine had not been applied; secondly, those cases had at least gone, as Lord Kenyon observed, to the utmost verge of the law, and he should find it very difficult to alter an opinion he had taken up, that it was not proper to go one step further, for in those cases, in order to serve the general intent, and the particular intent, they destroy both.(q)

13. This point was decided in the earlier case of *Adams v. Adams*.(r) where, under a power to appoint to children, the parent appointed by deed to the children for life, remainder to their sons in tail, remainder to their daughters in tail; the grandchildren were—as in the other cases—not objects of the power; and as the appointment was by deed, the doctrine of *cy pres* was not discussed; and Lord Mansfield, and the other Judges of B. R. certified to the Lord Chancellor, by whom the case was sent, that the power was exceeded by limiting the estates to the grandchildren, but that the limitations to the children for life were good, and the disposition of the inheritance to their children void. Therefore, as there was no appointment of the inheritance of the premises, the estate went to the uses declared by the deed

(o) *Routledge v. Dorril*, 2 Ves. jun. 364; and see *Knight v. Ellis*, 2 Bro. C. C. 570; *Keily v. Fowler*, Wilm. 298.

(p) 1 East, 451.

(q) 7 Ves. jun. 390.

(r) Cowp. 651; the certificate was confirmed 27th November, 1777.

creating the power, in default of appointment, subject to the estates for life to the children.

14. Where a partial interest is given to an object of the power with *remainders* to persons not objects of it, and the doctrine of *cy pres* cannot be applied, yet the whole appointment will not be void, but merely that part which is not authorized by the power. This rule is observed as well at law as in equity. The point, as we have incidentally seen, was expressly decided at law in *Adams v. Adams*,^(s) which was a case sent out of the Court of Chancery, where, under a power to appoint to children the estate was given to the two daughters for life, in moieties, remainder to their children in strict settlement. The Court of B. R. certi- [163] fied that though they were of opinion that the donee had exceeded her power, which was confined to child or children, by limiting estates to her grandchildren, yet they thought that the same ought to prevail so far as her power extended, and that the limitation to her daughters for life was good; but that the disposition of the inheritance to their child or children was void.^(t) As Mr. Justice Buller remarked, in a later case, there the estate was limited to daughters, &c. in being; and it is material to consider how the estate was divided. It was divided into moieties, one moiety to one daughter for life, remainder to her issue, with cross-remainders. The Court then say that the disposition of the inheritance to the children was void, but that the estates for life were good: that is, the estates for life to each of the sisters in their respective moieties, *reddendo singula singulis*.^(u) By a decree made in the cause on the 27th November, 1777, the Lord Chancellor, agreeing with the certificate, dismissing the plaintiff's bill. The same decision was made in Equity by Lord Rosslyn, in the case of *Bristow v. Ward*.^(x) although it was contended, that if the appointment could not take effect in the manner the distribution was made by the parent, the question would be, What he would have done if he had been apprised that, part failing, there would arise an inequality unforeseen by him as to

(s) Cowp. 651: *supra*, p. 48.

(t) And see accordingly, *Brudenell v. Elwes*, 1 East, 412; 7 Ves. jun. 382; *Phelp v. Hay*, App. No. 15.

(u) 2 Term Rep. 254.

(x) 2 Ves. 326; and see *Roberts v. Dixwell*, App. No. 16, the appointment over of the 2,000*l*.

his children? But Lord Rosslyn said, that the answer was, nobody could tell what he would have done; but that was not a ground for setting aside the whole: for each child to whom he had well appointed had a right to claim that.(y)

15. But there is infinitely more difficulty where the [*64] fund is given generally amongst persons, some of whom are objects of the power, and some not. This was one of the many points in *Alexander v. Alexander*,(z) where under a power of appointing a personal fund amongst *children*, the wife gave a portion of it to trustees, "upon trust to pay the interest thereof weekly, or otherwise, in such manner as the trustees should think most beneficial for the personal support and maintenance of her son Francis, *and his wife and children*." Sir Thomas Clarke, Master of the Rolls, first held that the discretionary power to the trustees was void. He then treated the case as if the mother had given it herself indefinitely for the benefit of Francis, his wife and children, laying the discretionary power out of the case as if never inserted in the will, and then he said, certainly so far as the wife and children were to have the benefit of it, that would not be good. And he thought that this appointment would not be considered a complete execution as to Francis, for the wife and children were to have something, and there was no possibility of distinguishing how much she exceeded her power. He then proceeded to consider whether there was any other way to make this good; and by a very artificial train of reasoning, he came to the conclusion, that Francis might take the whole fund, and decreed accordingly. His argument was this: "I own(a) I incline to think there is a method: Suppose the mother, instead of using the words she has, had given this one-fourth to be applied in such way as was most beneficial for her son, and his wife and children, *if they shall by law be capable*: I should not have doubted but that as the wife and children are not by law capable, it would be absolute to Francis; and the question is, whether there is any difference? This bears an analogy to what the dis-

(y) And see *Routledge v. Dorril*, 2 Ves. jun. 357; *Crompe v. Barrow*, 4 Ves. jun. 681; *Smith v. Lord Camelford*, 2 Ves. jun. 638.

(z) 2 Ves. 640; and see 2 Myl. & Cra. 251; *Martin v. Swannell*, 2 Beav. 249; *Crozier v. Crozier*, 3 Dru. & War. 353.

(a) 2 Ves. 645.

positions by the mother would be, if she had given it to a son by name who never appeared to have existence, or was never capable of taking; if *given to these four indefinitely, [*65] and three were incapable of taking, the fourth would have the whole; he must take such as the others were incapable of taking. It falls within the reason of the late case of *Humphrey v. Taylour*,^(b) where a personal estate was given to two in joint-tenancy; one was outlawed; and therefore the testatrix made a codicil, whereby she adeemed what was given to one of the two; the question was, whether the other joint-tenant should take only a moiety? But the Court held he was to take what the other did not; they were to take the whole between them. The mother never designed this fourth part should fall into the residue, and it would be extremely hard that it should. Then he will be entitled to the whole of that.”^(c)

16. The foregoing reasoning is not satisfactory; and it cannot be considered clear that a similar case would now receive a similar decision. At least, it is well settled by later determinations that a gift under a power, embracing objects not within the line of perpetuity, is wholly void, and the fund cannot be given to those to whom it might have been legally appointed.

17. Thus in *Gee v. Audley*,^(d) there was an appointment by will of 1,000*l.* in default of issue of Mary Hall, equally to be divided between the daughters then living of John Gee and Elizabeth his wife; and if that had been restrained to the death of the person executing the power, it would have been good. The bill was brought by the four daughters of John and Elizabeth Gee to have the fund secured for their benefit upon the death of Mary Hall without issue. Lord Kenyon held, that as the execution would take in children born after the death of the appointor, it was too remote, and he would not wait to see what contingency would happen.

*18. The same point arose in the case of *Routledge v. Dorril*;^(e) and Lord Alvanley, when Master of the Rolls, started the question, whether those children who might have been

(b) *Ambl.* 136.

(c) See *Crozier v. Crozier*, 3 *Dru. & War.* 369.

(d) 2 *Ves. jun.* 365, cited; reported in 1 *Cox*, 324, *nom.* *Jee v. Audley*, where it does not appear to have been the execution of a power.

(e) 2 *Ves. jun.* 357.

the proper object should take. At first, he said, he was of opinion, that as she might have appointed to the three children born before her death, when she appointed to all, these three might be considered as the sole objects: but upon considering it further, and particularly upon Gee and Audley, he was of opinion that would be a forced construction: and that the donee, in affecting to give this to all the issue her daughter might have at any time, had transgressed the power: and so far being ill executed, it was to be considered as not executed, and was totally void. The donee, he observed in another place, did not mean those only to whom she *might* have appointed, but *all*; and upon failure of all, then, and then only, she gave it over.(f)

19. In the case of Alexander v. Alexander, Sir Thomas Clarke, addressing himself to the impossibility of discovering the excess in the case before him, because it was given indefinitely, said, that had it been free from that circumstance of uncertainty, how much each was to take, *it would be void as to the wife and children*, who were not objects of the power. Suppose, he added, she had given it to the husband, his wife and children, in gross sums absolutely, *equally to be divided*, that would have been bad, and an excess of her power, and if it had been such a partial appointment, *so far as void*, it would have fallen into the residue.

20. Now in the cases of Gee and Audley, and Boutledge and Dorril, the fund *was* given equally amongst the children, but yet the Court would not consider the appointment good *pro tanto*. However, those cases turned on the remoteness of the limitation;

and it should still seem that where the fund is given [*67] amongst several objects, some of whom cannot take, and the excess can be ascertained, the objects who are capable may in most cases take their shares:—If a fund should be given between the parent capable, and his children incapable, in equal moieties, it seems clear that the parent would be entitled to his moiety: so if the fund were given equally amongst the objects of the power, and strangers living and ascertained, there appears to be no solid principle upon which the real objects could be refused the shares to which they would have been entitled

(f) Upon the law as to general gifts, see Leake v. Robinson, 2 Mer. 390; Farmer v. Francis, 2 Bing. 155; Bull v. Pritchard, 1 Russ. 216; Jones v. Mackilwain, 1 Russ. 222.

upon a division if the whole appointment had been valid.(g) Lord Alvanley appears to have been of that opinion.(h) and the point has lately been so decided in *Sadler v. Pratt*.(i)

21. Although a limitation be void, as not authorised by the power, yet it is not considered absolutely void, so as to accelerate the remainders dependent on it, which, if given immediately, would have been good; but notwithstanding that it be void itself, yet it prevents the limitations over from taking effect;(k) for, as Lord Alvanley observed, it would be monstrous to contend that though it was appointed to the remainder-man in failure of the existence of persons incapable of taking, yet notwithstanding they exist, he should take it as if it was well appointed to them, and they had failed. It is given upon a contingency*, upon which there is no right to give it.(l) And where the first limitation is too remote, and therefore void, a subsequent limitation to an object of the power shall not take effect, although the person intended to take under the void limitation have actually failed.(m)

22. In *Alexander v. Alexander*.(n) under a power to appoint a personal fund to children, the donee appointed to a *daughter Catherine for life, and after her death to her [*68] children living at her death: in default of such child or children, the principal to her if she survived her husband, but if she died in his life the principal at her decease to go to James and Mary (two other children, objects of the power.) The gift to the daughter for life was held good, that to the grandchildren void. Next, the learned Judge said, as to the contingent interest to Catherine, if she had no children and she survived her husband, but in default thereof to James and Mary: suppose Catherine leaves children at the time of her death, it is impossible any of these limitations over should take effect, it will fall into the

(g) See 2 Ves. 644.

(h) See 4 Ves. jun. 786.

(i) 5 Sim. 632; *Palsgrave v. Atkinson*, 1 Coll. 190.

(k) *Alexander v. Alexander*, 2 Ves. 640; *Robinson v. Hardeastle*, 2 T. Rep. 241; *Bailey v. Lloyd*, 5 Russ. 330; but see *Doe v. Lord George Cavendish*, 4 Term Rep. 744, n. which in this respect is not law.

(l) *Routledge v. Derril*, 2 Ves. jun. 357; *Beard v. Westcott*. *Gilbert on Uses*, 270, n.; 1 *Turner*, 25.

(m) See 1 Vict. c. 26, s. 25.

(n) 2 Ves. 640.

residue, because it was no appointment, being only a partial appointment given only to Catherine for life; and yet the children, though they could not take themselves, would yet prevent the limitation over.

23. This was the case of an executory limitation, which was held incapable of taking effect unless in the event upon which it was given, although the prior gift was void. The distinction between such a case and that of a remainder in form limited to an object capable of taking after such an invalid estate, as we have before noticed, to a person not an object, or being an object, incapable of taking on account of remoteness, is that such a remainder as is void in its creation.

24. In *Doe v. Lord George Cavendish*(*o*) under a full power to appoint to children in fee, and in default of appointment there was a gift to the children as tenants in common in tail, with cross-remainders between them in tail, the donee appointed the estate to one son (Richard) for life, remainder to his sons in tail male, remainder to another son (George) for life, &c.; Richard died a bachelor, and Lord Mansfield said that it was objected that the appointment being void in part, should be void in toto; but as to that, the Court were of opinion that if void as to the children, it was good to Lord George for life.(*p*). But this is not ['69] law, and the contrary has frequently been determined.

Indeed Lord Mansfield appears to have ruled this very point in the prior case of *Adams v. Adams*, although the certificate is not clearly expressed on this head.(*q*)

25. In *Robinson v. Hardecastle*.(*r*) the power was to the husband, the tenant for life, to appoint to such of the children as he thought proper, and in default of appointment the estate was limited to the first and other sons successively in tail, with limitations over. The donee, in exercise of the power, appointed the estate to the only son for life, remainder to his sons and daughters in tail, and for default of such issue, to one of the daughters of the marriage in fee. The son died without issue, but had suffered a recovery. It was admitted that the limitations to the grand-child-

(*o*) 4 Term Rep. 741, n.

(*p*) And see 4 Term Rep. 246.

(*q*) Cowp. 651; *supra*, p. 48.

(*r*) 2 Term Rep. 241. 781; 2 Bro. C. C. 22. 344.

dren were void—they were not within the power, and were besides too remote—but it was insisted that the appointment to them was to be considered as if it had never been inserted in the will, and therefore the remainder to the daughter in fee was accelerated; and Lord Thurlow inclined to this reasoning. He said the question was, whether such an illegal estate being interposed, it shall not be considered as a nullity, and the next estate be brought forwards and attached to the estate for life. The cases seemed to support this doctrine, but not so clearly as for it not to deserve further consideration. The will must have the favourable construction of one; and you must consider the testator as intending, if the first was bad, that the subsequent limitation should take place, though this was an extraordinary intent to attribute to him.^(s) Mr. Justice Buller observed, that if a subsequent limitation depended upon a prior estate which was void, the subsequent one must fall with it. If, indeed, the subsequent limitation was not dependent upon the other, it might then take place, notwithstanding the first was bad. Upon a later day, after some observations which should be read [*70] by the student with caution, he treated the appointment to the son and his children as invalid, but thought that he either took an estate tail under the appointment or under the settlement. The second ground on which the daughter's title had been rested was, that if the immediate limitations in strict settlement to the son were void, it should accelerate the daughter's remainder in fee. But the case of *Alexander v. Alexander* was decidedly against it, for the Master of the Rolls there said, that though the children could not take, yet they should prevent the limitation over. When this case was directed to be sent here, the Lord Chancellor very properly observed, that to support this argument the testator must be considered as intending that if the first use was bad, the subsequent limitation should take effect, though this seemed an extraordinary intent to attribute to him. It would be extraordinary indeed, for then it must be said, that though the testator has expressed an intention in his will to provide for his son and his issue, the grandchild should be disinherited, which must be the consequence if the daughter's remainder should be

accelerated. The Lord Chancellor acted upon the opinion of the Court, that the daughter took no interest in the estate.

26. The doctrine was finally settled by the case of *Brudenell v. Elwes*,⁽¹⁾ where a woman, under a power to revoke and limit new uses amongst the children of the marriage, did revoke and limit life estates to two of the children, a daughter and son successively, and then to trustees to preserve contingent remainders, with remainder to the sons of the son (the tenant for life) in tail male, remainder to another son for life, remainder to trustees as before, remainder to his first and other sons in tail male, remainder to the daughter in fee. Both of the sons died without issue male. The question was, whether the remainder to the daughter

in fee was in the events good : and it was decided to be [71] invalid. Lord Kenyon said, the wife had no power under the settlement to appoint to the children of unborn children, but she was confined to execute her power among the children.⁽¹⁾ So far therefore as she appointed an estate for life to the daughter, with remainder for life to one of the sons, she did well ; beyond that she exceeded her power in appointing to the issue of that son, and therefore the excess was void. But it was equally clear that she did not intend that the subsequent limitation over to the daughter should be accelerated, but it was made to depend upon the intermediate limitation to the issue of her brothers, and she was not to take till their issue male were extinct. Those intermediate limitations therefore being void, the ultimate remainder dependent upon them must also fall. If then the appointment were originally bad for the excess, the subsequent circumstance of the death of the brother without having had

(1) 1 East, 442; 7 Ves. jun. 382; and see *Beard v. Westcott*, 5 Taunt. 392; 5 Barn. & Ald. 804; 1 Turn. 25.

(1) The general rule seems to be that the exercise of a power in favour of a *class of persons*, as children, &c., is for the benefit of those living at the time of the appointment. Though *children*, in the ordinary sense, do not include grandchildren, yet in a will grandchildren and even great-grandchildren may take by the designation of children, when necessary to effectuate a manifest intent. This is the case when the word children is used co-extensive with issue, or when there are no children literally to answer the description. *Cutter v. Doughty*, 23 Wendell, 522; *Raft v. Rutherford*, 1 Bailey's Eq. Rep. 17; *Hallowell v. Phipps*, 23 Wharton, 376; *Dickinson v. Lee*, 4 Watts, 82; *Mowatt v. Carrow*, 7 Paige, 328; *Philips's Devisees v. Ball*, 9 Dana Kentucky Rep. 1.

issue, cannot make it good. The appointment must be legal at the time of its creation. Therefore the estate must go as in default of appointment beyond the two estates for life, according to the directions of the settlement.

27. But in a case where the fund was given to a son who was an object of the power, and was alive at the time it was created, for life, and after his decease to his wife and children, who were not objects; *but in case he should die without leaving a wife or child him surviving*, then to his sister, who was an object of the power; the trusts for the wife and children were determined by Lord Alvanley to be bad, but he at the same time held that if the son should die without leaving a wife or child surviving, the gift over to the daughter would be good. And he distinguished this case from the others, on the ground that this limitation over to the daughter was if the son should die without leaving a wife or child surviving. It fails as far as it affects to give interests to the children; but was there, he asked, any occasion to make it fail upon the other point, the gift over to a person who is an object of the power? Why was he to exclude the person **taking over who had a right to take?* There were two [*72] alternatives. If the son should leave no wife or children at his death, then the limitation over being to a good object would take effect; if he should leave a wife or children, then it could not take effect.^(u) As Lord Kenyon observed in a subsequent case,^(x) the case went upon the ground of its being an appointment with a double aspect, and therefore that if the contingency which went beyond the power should not happen, it would not stand in the way of those who might take under the appointment in the event which happened, and who were within the power.

28. So a gift to an object, with a gift over in a particular event to a person not an object, is void only as to the gift over.^(y)

29. Where no question of perpetuity arises, and the power authorizes a gift in remainder, a devise under a power to a stranger for life, with remainder to an object of the power, is void only as to the life estate, and valid as to the remainder, and the estate

(u) *Crompe v. Barrow*, 4 Ves. jun. 681; and see 3 Bro. C. C. 415; *Bailey v. Lloyd*, 5 Russ. 342, 344; *Hewitt v. Lord Daere*, 2 Kee. 622; and see *supra*, p. 67.

(x) *Brudenell v. Elwes*, 1 East, 450.

(y) *Brown v. Nisbet*, 1 Cox, 43.

during the life of the stranger will go as in default of appointment.(z)

30. So where actual estates are not attempted to be given, but a mere power is limited to a stranger to appoint the fund, and in default of appointment the fund is given amongst proper objects, the power being merely void on the ground that *delegatus non potest delegare*,(a) the ultimate limitation will take effect in possession. This was decided by Lord Hardwicke in *Ingram v. Ingram*,(b) where, however, the delegated power was to appoint the fund amongst the objects of the original power, and in default of appointment, the fund was given to the same objects.

[73] *31. It should seem that the rule would not prevail where a power is affected to be given to appoint the fund amongst *strangers*, because in that case it would be the intention of the donee of the original power, that the object should not take unless in default of execution of the delegated power in favour of the strangers. The intention of the donee of the power is the express ground upon which limitations over to good objects, after limitations to strangers, are held to be void; and the principle applies as forcibly to a *power* to appoint to strangers as to a direct gift to them. Nor would the rule, for the same reason, apply to a case where the delegated power is to appoint to some of the objects, and the fund in default of appointment is given to *others*, although objects of the original power. But in this last case it might be otherwise if, in default of appointment under the delegated power, the fund was given amongst *all* the objects.

32. Where the power to appoint to children was exercised in their favour, but the payment was postponed until the death of their mother, with a direction that she should receive the dividends for her life, and apply the same in the exercise of her sound discretion for the best interest and advantage of the children, the appointment as to the dividends was held to be wholly void, and they were during the wife's lifetime directed to go as in default of appointment.(c)

33. And where there is an absolute appointment to the chil-

(z) *Crozier v. Crozier*, 3 Dru. & War. 353.

(a) *Vide supra*, ch. 5, sect. 1.

(b) 2 Atk. 88.

(c) *Chester v. Chadwick*, 13 Sim. 102.

dren, the object of the power, and then a direction that, as far as the donee can at law or equity so direct, the shares shall be held upon trust for them for life, and then for their children; the appointment to the children will be supported, and the interests to the grandchildren will be deemed inoperative.(d)

34. This has been carried still further; for in a case *where the power included children or remote issue born ['74] in the lifetime of the mother, the donee, an appointment equally to several children (one of whom was an unmarried daughter, an infant, who remained so at her mother's death) was held to give to the daughter her share absolutely, although the testatrix proceeded to declare that the daughter's share should be vested in trustees for her separate use for life, and after her death to her children, with a power to her to have 500*l.* at twenty-one or marriage with consent.(e) For this was considered to be within the authority of *Carver v. Bowles*; because although the words in that case, "so far as I lawfully can or may," were not contained in this will, yet the effect must necessarily be the same. We should be careful how we apply this doctrine; for where the absolute apparent gift is explained to be only a life interest, to which are added void gifts, we might be led to suppose that a gift to an object of the power for life, with a gift over to his children not objects of it, would vest the absolute property in the object; which is contrary to the settled rule.

(d) *Carver v. Bowles*, 2 Russ. & Myl. 301.

(e) *Kampf v. Jones*, 2 Kee. 756.

[*75]

SECTION II.

OF EXCESS IN THE QUANTITY OF ESTATE.

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| 1. Complete execution, with excess, the latter void.
2. Lease for more years than warranted, good in equity <i>pro tanto</i> .
3. Bad at law.
5. Unless excess is by a distinct limitation.
7. But if the two limitations make one estate, bad.
8. Charge of a larger sum than warranted, good in equity.
9. So if time is wrong at which the interest begins. | 10. A privilege limited by the donee of the power to himself, not warranted, void.
11. Appointment though wrong, valid, if the interest is defined in the creation of the power.
12. Equitable estate instead of legal, bad.
13. Bland v. Bland, with observations.
15. Excess of interest not corrected at law by reference to the power.
16. Covenant for enjoyment limited to life does not cure excess in an appointment in fee. |
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1. THE same principle prevails in this case as in the former. Where there is a complete execution, and something *ex abundanti* added, which is improper, there the execution shall be good, and only the excess void; but where there is not a complete execution of a power, and the boundaries between the excess and execution are not distinguishable, it will be bad. (*f*)

2. If a man having a power to lease for twenty-one years, lease for forty, that will be good in equity *pro tanto*, because it is a complete execution of the power, and it appears how much he has exceeded it. (*g*) This point has often been decided, and was determined in the great case of Campbell and Leach, (*h*) where, under a power of leasing for twenty-one years, a lease for twenty-six years was granted, and it was holden to be void only for the excess.

[*76] 3. But it was admitted at the bar in that case, and appears to have been considered by the Court, that the excess rendered the lease void at law; and Hale, when Chief Baron, expressed his opinion clearly, that if a man has power to make leases for twenty-one years, and he make a lease for twenty-

(*f*) Per Sir Thomas Clarke, 2 Ves. 644; and see 13 Ves. jun. 576.

(*g*) Ibid.; and see Parry v. Brown, 2 Freem. 171; 3 Cha. Rep. 610; Nels. Ch. Rep. 87; and see Anon. 2 Freem. 224; Barnard. Cha. Rep. 116.

(*h*) Ambl. 740.

two years, it is not good for twenty-one years.(i) And in a recent case the Court of King's Bench actually decided that the excess was fatal at law.(k) We cannot fail to distinguish this case from cases like that of Adams and Adams.(l) where a *distinct and independent* limitation is introduced, not authorized by the power; whereas in cases like Campbell and Leach the excess is interwoven with the limitation authorized by the power. The same rule must apply more forcibly where the lease is made, contrary to the power, to commence *in futuro*, for no limitation of the term will make a lease in reversion a lease in possession.(m)

4. In one case Holt, C. J., said, *obiter*, as for the case put upon the statute of Elizabeth, where a lease is made by a Bishop for twenty-two years, it shall be void in the whole, and shall not be good against the successor for twenty-one years, because the statute ties it up to that form.(1) But if the words of the statute were, that they might make leases for any number of years not exceeding twenty-one years, if a lease were made for twenty-two years, it would stand good for one-and-twenty years.(n)

5. When a *distinct* limitation is superadded, it will be merely void, and will not affect a prior valid appointment, even at law; as, if under a power to lease for twenty-one years, a lease be accordingly made for twenty-one years, and by [77] the same deed the donee limit a further term in this manner, *viz., and from and after the term aforesaid for one year more* the power will be well executed by the first limitation, and the excess will be surplusage not to be regarded.(o)

6. The leading case of Common v. Marshall(p) appears to have been decided on this ground. There, Lord Netterville had a power of leasing for any term, not exceeding thirty-one years, or three lives, to commence in possession, and he granted a lease

(i) Hard. 398.

(k) Roe v. Prideaux, 10 East, 158.

(l) Vide supra, p. 48.

(m) Doe v. Calvert, 2 East, 376.

(n) 2 Lord Raym. 1000.

(o) Fitz 157; and see 2 Scho. & Lef. 352.

(p) 7 Bro. P. C. 111; see S. C. Lord Netterville v. Marshall, 1 Wall. & Lyme, 80.

(1) The words are,—all grants, estates, &c., whereby any estate should pass other than for term of twenty-one years, or three lives from such time as the same shall begin—shall be void.

for three lives, *or* for thirty-one years, *which should last longest*. The Court of Exchequer in Ireland construed the word *or* into *and*, and so made it a lease certain for lives, with a *remainder of* thirty-one years : and, considering the excess only as void, gave judgment in favour of the lessee. Upon appeal to the Exchequer Chamber in Ireland, Lord Chief Justice Annaly delivered his opinion for reversing the judgment, but the Lord Chancellor being of a different opinion, affirmed it. Upon this a writ of error was brought in parliament : and it was insisted, for the plaintiff in error, that the words *which shall last longest* showed that *both* the terms for lives and years were not intended to pass, but one only, and which it should be was to depend upon the event mentioned, and could not therefore *commence in possession* at the making of the lease, as expressly required by the power. On the other hand, it was insisted that the lease, so far as it was a lease for three lives, was clearly warranted by the power, and this was apparently the primary object of the parties. Besides this they had a second in view, which was, to secure the estate to the lessee for thirty-one years in case the lives should determine sooner. But this was not warranted by the power, and was therefore void ; but the excess only was to be corrected. The Judges here gave an unanimous opinion in favour of the lease, and the [*78] House of Lords decreed accordingly. Lord Mansfield observed, in a later case, that the lease it was contended was in manifest opposition to the power, because, instead of being a lease for one or other of the terms *expressly*, as the power directed, it was a lease for one or other as chance should direct, but the lease was supported.(q)

7. But where the limitations, although several and distinct, make but one estate in law, the appointment is wholly void at law by reason of the excess ; as, if under a power to appoint for life, the donee appoint to the object of the power for life, and after his death to the use of his (the appointee's) heirs, or the heirs of his body, the two limitations coalesce, and the appointment is, in effect, of an estate in fee, or an estate in tail, and

(q) Cowp. 268. Lord Mansfield transposes the clauses in the power, and says, the words *three lives* were rejected. This is obviously a mistake.

therefore is at law void *in toto*,^(r) although the excess would be corrected in equity.

8. In equity also, a power to charge a particular sum, as 7,000*l.* will be duly executed by a charge of a larger sum, as 8,000*l.*, and the excess only will be void.^(s)

9. So equity will correct a mistake in the execution of a power with respect to the time at which the interest should commence.^(t)

10. In some cases a power at first sight appears to be exceeded, when in fact the excess is a mere void declaration. Thus in the case of *Thomlinson v. Dighton*,^(u) where a tenant for life, with a power to appoint the inheritance to her child, limited the estate to herself for life, *without impeachment of waste*, with remainder to her child in fee, it was objected, that the conveyance left in her an estate for life, *without impeachment of waste*, which was not in her power to do. Lord Chief Justice Parker, in delivering the unanimous opinion of the Court, said, [179] that the child would be in, not by virtue of her conveyance, but by the will creating the power, and so would overreach her estate without impeachment of waste; and consequently that clause in the conveyance "without impeachment of waste," would have no operation, for the child might, notwithstanding, bring an action of waste against her.

11. So where the quantity of interest to be taken by the appointee is expressly limited by the instrument creating the power, and the donee is only authorized to appoint the *lands* over which the estate is to ride, an appointment by him of an interest exceeding that intended to be given to the appointee, is tantamount, even at law, to a regular appointment. This is the case of *Peters v. Moorehead*,^(v) where an estate was given by will to the son for life, and then the testator devised *such part of the said lands as his son should appoint* to such wife as the son should marry, for her life, with remainder to the sons of the son. The son exercised his power by granting the estate by deed, merely sealed

(r) Fitz. 157; sed qu.

(s) *Parker v. Parker*, Gilb. Eq. Rep. 168.

(t) *Probert v. Morgan*, 1 Atk. 440.

(u) 10 Mod. 31. 71.

(v) Fort. 339; Fitz. 156.

and delivered, to trustees, in trust for himself for life, and after his death to the use of his intended wife for life, and after her death to the use of the heirs male of her body. The Court thought, that as the two limitations made but one estate in the wife, it would, in a common case, have been a void execution: but they held that the son had power, not to limit the estate, but to appoint the land, so that the question simply was, whether he had sufficiently specified the land; and they decided in favour of the validity of the appointment. Eyre, Chief Justice, even thought that, though the son had limited an inferior interest, yet the wife should have an estate for her life; but Fortescue is reported to have doubted if the son had barely appointed the land without limiting any estate, whether it would be good. It is observable, however, that the learned Judge does not notice [80] this doubt in his own report of the case, and it certainly is directly overruled by the decision itself, which was, that the son had no power to limit the estate in the land, but only the land itself; and it is in express opposition to the opinion of the Chief Justice, that the wife would have taken for life, though a less estate had been limited to her.

12. But this was a common-law power, and the doctrine must not be carried too far: for in every case of a power to appoint to A., an appointment to B. in trust for A might be said to be a valid appointment to A., to whom, and not to B., the power extended. But, generally speaking, the real object could not take, and the appointment would be void, at least at law. In *Churchman v. Harvey*, where the power, which operated under the statute and ought to have been exercised in favour of the wife for life, was exercised by appointing the estate to trustees for her for ninety-nine years, if she should so long live, it was held to be bad. Wilnot, Lord Commissioner, said, that the appointment being to trustees furnished a further objection. Powers were introduced since the statute of uses; they operate as a declaration of uses, which, as they may be created by declaration, so they may be determined in the same manner. The feoffees are seised to the use which by the appointment is declared to the trustees, and a super-addition to the use of the wife is void at law, being a use upon a use.(x)

(x) Amb. 340. See *Trollope v. Linton*, 1 Sim. & Stu. 477; *supra*, vol. 1, p. 489.

13. In *Bland v. Bland*,^(y) in a strict settlement upon the first and other sons of the marriage in tail, there was a proviso giving to the father, after the birth of a son of that marriage, power to reduce such son to be tenant for life, with remainder to trustees to preserve contingent remainders, with remainder to the first and other sons of such first or only son in tail male, and the uses in the settlement were to cease, and the settlement was to enure to the use of such son for life, with remainder to two trustees to be for that *purpose therein named, and [*81] their heirs, during the life of such son, then to the use of the first and other sons of such son in tail male. Lord Hardwicke doubted the validity of the power (which point is now settled), but thought it unnecessary to decide that question, because he was of opinion that the power, if it had been good, was not well executed. The donee had by his will, in pursuance of his power, “made and appointed his son John to be only tenant for life of the premises, with remainder to his heirs male.” The Lord Chancellor said that these powers must be strictly executed; the power requires that he do declare his intention to reduce the estate to the son into an estate for life, with a remainder to trustees to preserve contingent remainders, and after his decease to his first and other sons in tail male: which he has not done. It was said at the bar, that it was sufficient for him to declare his intention of altering the old uses, and the other uses would take their rise from the settlement; but that is not sufficient, and it must be looked upon as strictly as if an ejectment were brought, and at law it is evident this would have amounted to an estate tail in the ancestor. But suppose a Court would construe this into an estate for life in the son, with remainder to his first and other sons in tail, then it would not be good, for here are no trustees to preserve contingent remainders. It had likewise been said that this execution should be construed favourably, because it was reserved to the original owner of the estate; but a Court will never supply such defective execution of a power, unless when executed for a valuable consideration, or in support of, or as maintenance for wife or children.

14. It is clear that the nomination by the donee of the power

(y) 2 Cox, 349.

of two trustees was necessary to the due execution of it. That was required by the power. If, however, that had been complied with, there appears to be ground to contend that the donee's declaration was a sufficient signification of his intention [*82] that the estate should go according to the power, and then the settlement itself provided for the uses to arise. The distinctions in these cases are but thin. An intention could not be collected from his words that his son should take an estate in tail male, because he was already tenant in tail male under the settlement, and therefore to give a strict legal interpretation to the words would render the appointment altogether nugatory.

15. In *Wykham v. Wykham*, (z) where, as we have seen, the power of jointuring authorized an appointment to trustees, upon trust, by the rents and profits, to raise and pay the rent-charge for the wife during her life only, and the power was exercised by an appointment to trustees *in fee*, to raise and pay a jointure rent charge to the wife for her life; and the donee, the husband, covenanted that he had good right to make the appointment, and that the trustees, in case the lady should survive him, should after his decease, during her life only, quietly enjoy and receive so much of the rents as should be sufficient to pay the rent-charge: it was held, that the appointment in fee was not warranted by the power; and the question then arose, whether by construction the appointment could not be confined to the lady's life. Lord Eldon observed, that this power was to grant, convey, limit and appoint to trustees, without saying to them and their heirs, or their executors, leaving the nature and quantity of the estate they were to take open to the construction of the person who was to execute the power. There was nothing which could determine what he was to do, except by reference to the instrument out of which the power arose, the estates contained in that instrument, and the purposes for which the power was given. With respect to the instrument out of which the power arose, if the nonconformity of the nature of the estates raised by the execution of the power, to the estates expressed in the instrument by which the power was given, was of itself a ground to say that the person executing the power had not attempted to give a larger

*estate, and ought to cut down the legal effect of the in- [*83] strument, and make it what it ought to be, according to the intention and the nature of the instrument out of which the power arises, how, he asked, are we to account for many cases where the execution was capable of being so corrected by reference to the instrument, but was not so corrected?—In another passage, he observed, this instrument is to be considered in two ways, with reference to itself, and to the instrument giving the power, which the other purports to execute; but if an instrument which purports to be the execution of a power does convey in language, the legal effect of which goes beyond the power, he could not find that you look to the instrument in which the power is given in order to correct the excess at law. If you look to the executing instrument itself, it purports to be a grant in fee, and it is a deed. It purports to be a grant in fee, for purposes certainly not requiring a fee, but still it purports to be a grant in fee; and it was, he thought, difficult to maintain that if a man does more, by using words which have a legal effect, than is necessary to execute the purpose he professes to execute, the circumstance that he uses those words of larger legal effect than is required, and his purpose, shall cut down the legal effect of the words in a deed. Unless he could infer that the estate given in this instrument to trustees, and their heirs, is not a fee, as it was not necessary to give a fee for the purpose for which the instrument was executed, and as there was a covenant for quiet enjoyment only during the life of the wife, and as it might disturb the estates which were subsequently given in the instrument creating the power to give the estate, he could not cut down the legal effect of the limitation to the trustees and their heirs.

16. Lord Eldon, addressing himself to the covenants that the appointor had a right to make such grant, and that the trustees should be at liberty during the wife's life to enter and take as much of the profits as would be sufficient to answer the jointure, observed, that another circumstance had [*84] been relied upon, and fairly relied upon, that is, the covenant; but where a person executing a power has infinite difficulty, considering the language in which the power is given, to know in what way to create the estates which are to be created, it is going much too far to say, that having in fact given a larger

estate than was necessary, as he covenants for quiet enjoyment only during the time necessary to answer the beneficial interest, that covenant shall cut down the legal effect of the grant. That he apprehended could not be made out, nor was it made out by any of the cases referred to.

SECTION III.

OF EXCESS IN THE CONDITIONS ANNEXED TO THE ESTATE.

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|---|---|
| 1. Conditions only, void. | 7. Condition that the gift shall be a satisfaction, void. |
| 2. As to release a debt. | 8. Charge of debts not authorized, that only void. |
| 3. Or to allow other persons to share. | 9. Gift to an object for other purposes, void. |
| 4. Payment at a wrong day, that direction only, void. | 12. Valid appointment separated from invalid ones in the same deed. |
| 5. So a gift over in a certain event. | |
| 6. Void condition confined to property. | |

1. WHERE conditions are annexed to the gift not authorized by the power, the gift is good, and the condition only is void, so that the appointee takes the fund absolutely.

2. As, if an appointment should be made, and a condition annexed to it, that the appointee shall release a debt owing to him, or pay money over, the appointment would be absolute, and the condition only would be void, because the boundaries [*85] between the excess and proper execution are precise and apparent.(a)

3. So where under a power to appoint to the children of a first marriage, the wife, who survived and married again, appointed the fund amongst *all* her children, and declared that if any one of her children by the first husband should refuse to share the property with her children by her second husband, the child so refusing should not have any part of the trust property; and in case all her children by her first husband should refuse, then she bequeathed the whole of the property to her youngest child by

(a) See 2 Ves. 664; 1 Atk. 564; and see *Burleigh v. Pearson*, 1 Ves. 281; *Hewitt v. Lord Dacre*, 2 Kee. 622.

her first husband. This ingenious device was considered void, and as there were four children of the first marriage, and three of the second, the appointment was supported as to one-seventh to each of the first four children, and the remaining three-sevenths vested in them also, as in default of appointment.(b)

4. So if the power be only to give the property unconditionally, and it be exceeded by directing the portions to be paid at the age of twenty-one or day of marriage, the appointment will be reformed so as to make the portions vest at once.(c)

5. So if, under a power to appoint an estate to an object in tail, or in fee, the donee appoint to him in tail or fee, with a proviso, that if he died under twenty-one, without issue, or the like, the estate shall go over, the first appointment will be good, and the qualification annexed to it will be void.

6. Where a person by mistake supposed his power to extend over all the funds in the settlement, and annexed a hotchpot clause to his *appointments*, it was held to extend to the portions not subject to the power.(d) But there 'the [*86] same objects (subject to the power over part) were entitled to both of the funds in settlement.

7. In the case of *Roberts and Dixall*(e) the father's estate was charged with 1000*l.* for younger children, and he had a power over his wife's estate, in favour of the younger children. He gave the only child 3,000*l.* which he declared should be in satisfaction of the 1,000*l.* charged on his own estate, and in pursuance of this power he charged the 3,000*l.* on his wife's estate. Lord Hardwicke said, that where a gift was to discharge a former debt, something should move from the giver, but here the whole was to arise out of his wife's estate, and therefore to satisfy the father's covenant as to the charge on his own estate, this declaration was entirely void; however, as his intention was only to give his daughter 3,000*l.*, Lord Hardwicke decreed that 2,000*l.* ought to be raised upon the wife's estate, and the other 1,000*l.* out of the father's estate.

8. Perhaps we should in this place notice a point which arose

(b) *Saddler v. Pratt*, 6 Sim. 632; *Palsgrave v. Atkinson*, 1 Coll. 190.

(c) *Dillon v. Dillon*, 1 Ball and Beatty, 77.

(d) *Ward v. Firmin*, 11 Sim. 235.

(e) 2 Eq. Ca. Abr. 668, pl. 19; S. C. App. No. 17.

in *Robinson v. Hardeastle*, (f) but was not decided. The donee of the power appointed the estate by his will, *charged with the payment of his debts*, which he had no authority to do, and Mr. Justice Buller said, that this, *perhaps*, might render the *whole* execution of the power void. There is, however, no authority for this. If the estate had been given to the object of the power, upon condition that he paid the donee's debts, the appointment would have been good even at law, and the condition void. This case is in effect the same, and would, it should seem, receive a similar decision. At any rate, in equity, the excess only in the appointment would be void. Where there is other property comprised in the gift which the donee has a right to charge, that will remove all objection.

9. But where the gift by will under a power was of a ['87] sum of 2000*l.* to the testator's daughter, to have him properly buried, and to pay what small debts he might owe at his decease, it was held that the gift could not be separated from the purpose expressed, and that the appointment was therefore bad. (g)

10. Where the fund is sufficient to answer the appointment, the latter will be valid, although the donee of the power by mistake supposed his power to have a wider range over property ; and in like manner the appointment will be valid, *pro tanto*, if the fund prove partially deficient. (h)

11. We have already had occasion to consider the converse of the cases just discussed, viz. where an interest can be granted short of that authorized by the power. (i)

12. This subject must not be dismissed without observing that a valid appointment will be sustained, although confounded in the same deed with other subjects not relating to it. In Lord Conway's case it appeared that he, having power to grant leases of his estate, by one instrument granted several, some of which were not within the power : and though all were by the same instrument, they were considered as several leases, and it was sent to the Master to separate them. (k)

(f) 2 T. Rep. 241. See *Bailey v. Lloyd*, 5 Russ. 339, where there was other property; *Wallop v. Lord Portsmouth*, App. No. 11.

(g) *Hay v. Watkins*, 3 Bro. & War. 339.

(h) *Wade v. Firmin*, 11 Sim. 235.

(i) Vide *supra*, vol 1, p. 494.

(k) 2 Ves. 645, cited.

*CHAPTER X.

[*88]

OF EQUITABLE RELIEF IN FAVOUR OF DEFECTIVE EXECUTIONS OF POWERS.

SECTION I.

WHERE THERE IS A MERITORIOUS CONSIDERATION IN THE APPOINTEE.

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|---|---|
| 1. Origin of jurisdiction: confined to equity. | 31. No relief indirectly for creditors. |
| 6. Stands on the same ground as surrenders of copyholds. | 32. Claimant must have a preferable equity. |
| 9. Purchaser, mortgagee, lessee, relieved. | 34. Prior appointee may become a trustee. |
| 10. Creditor also. | 35. Purchaser from an appointee claiming relief not entitled to higher equity. |
| 11. Wife and child also. | 37. Relief granted against purchasers. |
| 12. Charity also. | 41. Relief granted although the settlement was voluntary. |
| 13. Husband not relieved. | 43. Whether a surrender can be supplied against an heir unprovided for. |
| 14. Natural child not. | 45. Application of the doctrine to powers. |
| 15. Grandchild not. | 47. Relief may be given, although against parties having equal equities, as children. |
| 16. Father, mother, brother, sister, nephew, cousin, not. | 48. Execution of power by donee who has covenanted to pay off incumbrances. |
| 17. Volunteer not. | 49. Relief against damages recovered upon executing a valid appointment. |
| 18. Legal consequences not relieved against. | 50. No relief under the Act abolishing recoveries against defective executions of the authorities or against protector. |
| 19. Defective appointment by married woman aided. | |
| 21. Sir Thomas Plumer's opinion. | |
| 24. Creditor, &c. must be such of donee, sensible. | |
| 25. Observations on Wilkie v. Holmes. | |
| 26. Defective execution of a power of revocation not aided for the settlor himself. | |

1. We have before seen that powers took their rise before the Statute of Uses, and were then sanctioned and protected by equity only; nor did equity suffer the statute to deprive it of this valuable branch of its jurisdiction. At law, the omission of any circumstance required to the execution of a power was deemed fatal; but equity, where there was a

[*89]

good or a valuable consideration, interposed its aid, and supported the defective execution of the power.(1)

2. It was observed by the Court in *Coventry v. Coventry*,(a) that after the statute of uses the courts of common law held that powers in derogation of estates executed were to be taken strictly, and therefore if not pursued, they would not impeach or destroy an estate already executed by legal conveyances. But in the courts of equity they soon found that the construction was too artificial, and not according to natural equity, and therefore they construed these powers as a reservation of so much of the ancient dominion of the estate, to be under the control of the tenant for life. *Et cuius est dare illius est disponere*, and as often as any such dominion is reserved, the tenant for life may contract about it. When a marriage contract is made in contemplation of the execution, it was a real lien on the estate, and therefore a court of equity may decree it against the remainder-man, because he claims under the creator of the power, whose intention was that such a charge should be induced on the land.

3. Before the limits to this equitable relief were fully established, it was speciously argued, that although the circumstances required to a power must be observed at law, yet when a man hath a power over an estate, those circumstances are only a guard upon himself that he may not be surprised into a sudden disposition of it. But when deliberately and solemnly he hath done an act whereby he disposeth of this estate, but there wants some little ceremony or circumstance, such as the not tendering 12*d.* or the like, a court of equity ought to supply such a defect, to support this solemn intention to dispose of it; for, plain it is, he [*90] is not surprised into this act, and so the reason for those circumstances fails, and they need not be strictly observed. But to this it was answered and resolved, that powers were similar to conditions at common law; and as a man must perform a condition at common law to entitle him to re-enter, he must execute his power to entitle him to a revocation. And a Court of equity can no more let a man in to defeat an estate upon a power of revocation, without a due execution of the power, than the

(a) 1 Str. 601.

common law could let in a man to defeat an estate upon a condition, without performance of the condition ; or than a court of equity can permit a man to defeat a voluntary conveyance without a power of revocation ; for it is all but a condition which must be performed, or no advantage taken of it ; and a court of equity may do great things, but they cannot alter things, or make them to operate contrary to their essential natures and properties. (b)

4. In modern times it has been contended, that whatever is an *equitable*, ought to be a *legal*, execution of a power : (c) because, as Lord Mansfield observed, there should be a general rule of property ; and if the courts of equity say, we will presume that where the execution is for a meritorious consideration, a strict adherence to the precise form was not intended, and therefore it is not necessary, the moment the same rule is fixed and adopted at law, every man who creates, and every man who is to exercise a power understands what he is to do ; (d) and he considered that where there is a meritorious consideration, it was not necessary even at law strictly to adhere to the precise form. (e) The vice of this reasoning is, that equity itself does hold the power well executed, unless the form is adhered to ; but where the execution is for a meritorious consideration, compels the person seised of the estate in default of execution of the power to make [*91] good the defect—a jurisdiction which courts of law cannot assume, because they have no means of enforcing its observance. At the present day, however, Lord Mansfield's doctrine is completely exploded : (f) equity alone can relieve against defective execution of a power, and that only where there is a meritorious consideration in the person applying for the aid of the Court.

5. Sir William Grant, with his usual precision, strongly observed, (g) that it is difficult to discover a sound principle for the authority which equity assumes for aiding a defective execution in certain cases. If the intention of the party possessing the power is to be regarded, and not the interest of the party to be affected by the execution, that intention ought to be executed wherever it is manifested ; for the owner of the estate has noth-

(b) See 3 Cha. 66, 77, 107, 108.

(c) Zouch v. Woolston, 2 Burr. 1126.

(d) Cowp. 267. (e) Ibid. 269.

(f) See 2 H. Blackst. 139.

(g) 7 Ves. jun. 506; and see 15 Ves. jun. 51.

ing to do with the purpose : to him it is indifferent whether it is to be exercised for a creditor or a volunteer. But if the interest of the party to be affected by the execution is to be regarded, why, in any case, exercise the power, except in the form and manner prescribed? He is an absolute stranger to the equity between the possessor of the power, and the party in whose favour it is intended, to be executed. As against the debtor it is right that he should pay.⁽¹⁾ But what equity is there for the creditor to have the money raised out of the estate of a third person, in a case in which it was never agreed that it should be raised? The owner is not heard to say it will be a grievous burthen, and of no merit or utility. He is told the case provided for exists : it is formally right ; he has nothing to do with the purpose. But upon a defect which this Court is called upon to supply, he is not permitted to retort this argument, and [*92] to say it is not formally right : 'the case provided for does not exist : and he has nothing to do with the purpose. In the sort of equity upon this subject there is some want of equality. But the rule is perfectly settled, and though perhaps with some violation of principle, with no practical inconvenience.

6. In *Chapman v. Gibson*,^(h) Lord Alvanley laid it down that the execution of a power and a surrender of a copyhold go hand in hand precisely on the same ground, consequently the same relief is to be granted in cases of defective execution of a power and of the grant of a surrender of a copyhold.

7. In a case in Ireland⁽ⁱ⁾ where the question was, whether equity could enforce a specific execution of a contract for a meritorious consideration resting in *ferri*, the Chancellor observed, that Lord Alvanley had stated that he thought the execution of a power and a surrender of copyhold went hand in hand, precisely on the same ground. Now equity always aids a defective execution of a power, voluntarily executed in favour of a wife or child, as depending upon the natural obligation. It did not follow that

(h) 3 Bro. C. C. 229; and see 17 Ves. jun. 297.

(i) *Ellis v. Nimmo*, Llo. & Geo. Rep. t. Sugden, pp. 340, 341. 348; see *Holloway v. Headington*, 8 Sim. 324; *Gannon v. White*, 2 Ir. Eq. Rep. 203.

(1) The question was, whether the Court would execute a power in favour of creditors.

the defect would be aided against the husband or father himself, because equity generally does not aid defective settlements, and in those cases there is no contract. But even though there be no contract, equity, with some violation of principle, as Sir W. Grant had pointed out, aids the defect against the person in whom the estate is vested, not universally, but only in favour of a meritorious consideration. Defective executions of powers, he observed on another day, were said to be analogous to the case before him. Such defective executions and defective surrenders of copyholds strictly depend upon the same rules. Now in these cases the Court executes the intention of the settlor either against his representatives or the person taking the estate, in default of a valid execution of the power or surrender of [*93] the copyholds, where there is a good consideration. If there be such a consideration, the party taking the estate is not permitted to rely upon the defect, but the Court will effectuate the intention of the settlor, and, speaking generally, this equity is enforced, not against the settlor himself, but in his favour, that is, in the execution of his intention, and at the expense of a third party. That rule is now settled. But the case before him did not rest exactly upon the same grounds as defective executions of powers; as in cases like the present there was a contract, whereas the former do not ordinarily arise out of a contract, but depend upon an intention to settle.

8. Thus, then, the jurisdiction stands, and we may inquire what amounts to such a consideration as will enable equity to interpose its aid in favour of a defective execution of a power.

9. The aid of equity then will be afforded to a purchaser, *(k)* which term includes a mortgagee and a lessee. *(l)(1)(1)*

10. And to a creditor. *(m)(1)*

(k) *Fothergill v. Fothergill*, 2 Freem. 257; *Anon. ib.* 224; 3 Cha. Ca. 68; Cowp. 267.

(l) *Barker v. Hill*, 2 Cha. Rep. 113; *Bradley v. Bradley*, 2 Vern. 163; *Taylor v. Wheeler*, 2 Vern. 564; and *Jennings v. Moore*, *ib.* 609; *Reid v. Shergold*, 10 Ves. jun. 370.

(m) *Fothergill v. Fothergill*, *ubi. supra*, 3 Cha. Ca. 89; *Pollard v. Greenvil*, 1 Cha. Ca. 19; 1 Cha. Rep. 38; *Wilkes v. Holmes*, 9 Mod. 485; *Ithell v. Beane*, 1 Ves. 215; *Bixby v. Eley*, 2 Bro. C. C. 325; 2 Dick. 698.

(1) The cases in Italics were decided upon Copyholds.

11. The like aid will be afforded to a wife, *(n)* and to a legitimate child; *(o)* for wives and children are in some degree considered as creditors by nature; *(p)* (1) and although to constitute a valuable consideration *for a settlement* on a wife or ['94] child, it must be made *before* marriage, yet the marriage and blood are meritorious considerations, and claim the aid of a court of equity in support of a defective execution of a power in their favour, *(q)* although the power was executed after the marriage.

12. The like equity is extended to a charity. *(r)* Lord Northington laid it down that the uniform rule of the Court before, at and after the statute of Elizabeth, was, where the uses are charitable and the person has in himself full power to convey, to aid a defective conveyance to such uses. *(s)*

13. But it has been decided that a defective execution of a power by a wife cannot be aided in favour of her husband; *(t)* (2) nor can a disposition by a married woman in conjunction with her husband, without the solemnities required by the power, although the trustees of the fund act upon it, be supported on the ground of the intention and the power to do the act; for the ceremonies in such a case are introduced for the express purpose of protecting the wife against the husband, and are matters of substance and not of form. *(u)*

14. Nor is the equity extended to a natural child. *(x)*

(n) Cowp. 267; *Fothergill v. Fothergill*, 2 Freem. 256; *Lady Clifford v. Earl of Burlington*, 2 Vern. 397; *Coventry v. Coventry*, 2 P. Wms. 222; and see *ib.* 705; 2 Cox, 357.

(o) *Sarth v. Lady Blanford*, Gilb. Eq. Rep. 166; *Sneed v. Sneed*, Ambl. 64; Cowp. 264, 265, cited; and see Cowp. 267.

(p) *Barnard*, C. C. 107.

(q) *Fothergill v. Fothergill*, 2 Freem. 256; *Hervey v. Hervey*, 1 Atk. 561; *Churchman v. Hervey*, Ambl. 335.

(r) Vide *supra*, vol. p. 254.

(s) *Attorney-General v. Tancred*, 1 Eden, 10; Ambl. 351; *Attorney-General v. Sibthorpe*, 2 Russ. & Myl. 107.

(t) *Watt v. Watt*, 3 Ves. jun. 244; *Moodie v. Reid*, 1 Madd. 516; and see *Sargeson v. Sealey*, 2 Atk. 412.

(u) *Hopkins v. Myaall*; 2 Russ. & Myl. 86.

(x) *Fursaker v. Robinson*, Pree. Cha. 475; *Tudor v. Anson*, 2 Ves. 582.

(1) See 1 Story's Eq. Jur. § 169.

(2) 1 Story's Eq. Jur. § 170.

15. Nor, as it has at length been determined, to a grandchild.(y)

16. Neither will it extend to a father(z) or mother, or brother or sister even of the whole blood,(a) much [95] less of the half-blood.(b) or to a nephew,(c) or cousin.(d)

17. And *a fortiori*, it cannot be afforded to a mere volunteer.(e)(1)

18. Of course there can be no aid in equity against the legal consequences of an appointment; therefore if an appointment be made by will, and the appointee die in the lifetime of the testator, the gift will lapse, whatever might have been the intention, and although the power might have been executed by act *inter vivos*. In the report of *Wilkie v. Holmes*,(f) where the will in execution of the power was defectively executed, Lord Hardwicke said, In the case of *Tollett v. Tollet* the husband had a power to make a jointure to his wife by deed: he made it by will: this defect was set right in equity; which determination goes a great way to decide the present question; for why may not this defect be supplied, as in that case, a deed be changed into a will? In the case of *Duke of Marlborough v. The Earl of Carlisle*, M. T. 1750, there was no consideration of merit to make the Court supply the defect. It seems that at the moment Lord Hardwicke must have considered that a will might, if there was a meritorious consideration, be supported as a deed in equity against the legal effect of a will. For the case referred to is *The Duke of Marlborough v. Lord Godolphin*, and there the gifts lapsed by the death of the

(y) See *Kettle v. Townsend*, 1 Salk. 187; *Watts v. Bullas*, 1 P. Wms. 60; *Free-stone v. Rant*, ib. 61, n.; 3 Bro. C. C. 231; *Fursaker v. Robinson*, Prec. Cha. 477; *Tudor v. Anson*, 2 Ves. 582; *Chapman v. Gibson*, 3 Bro. C. C. 229; *Hills v. Downton*, 5 Ves. jun. 567; *Perry v. Whitehead*, 6 Ves. jun. 514; and see 1 Watk. Copyh., 136, 138.

(z) *Sloane v. Lord Cadogan*, App. No. 10.

(a) *Goodwyn v. Goodwyn*, 1 Ves. 228.

(b) *Gooding v. Nash*, 2 Atk. 189, which overruled *Watts v. Bullas*, ubi sup.

(c) *Strode v. Russell*, 2 Vern. 621; *Marston v. Gowan*, 3 Bro. C. C. 170; and see *Piggot v. Penrice*, Com. 250.

(d) *Tudor v. Anson*, 2 Ves. 582.

(e) *Smith v. Ashton*, 1 Freem. 309. See 3 Cha. Ca. 113, 126; *Sargeson v. Sealey*, 2 Atk. 115; *Godwin v. Kilsha*, Ambl. 684; Reg. Lib. A. 1768, fol. 495.

(f) 9 Mod. 486.

legatees in the lifetime of the testatrix. But no merit in the legatees could have enabled a Court of Equity to support the lapsed legacies. In the case of *Tollet v. Tollet* the donee might

have appointed by deed, with a power of revocation.

[*96] He appointed by will, which is in its nature revocable.

It was not attempted to give to the will the irrevocable character of a deed.

19. To the granting of the relief it is only necessary that the person executing the power defectively should have ability to raise the estate if the power had been properly pursued, and that the appointee should be one of the favoured classes. A defective appointment therefore by a married woman will be aided in just the same manner as if she was *sui juris*; and as to the extent of her power she is *sui juris*, it would seem that a contract by her to do an act within her power would be binding upon her and upon the person entitled in default of appointment.

20. Even where a married woman executed a power of leasing defectively, as a security for a debt, and afterwards entered and received the profits, although the defect was one that could not be supplied, yet the estate attempted to be created was treated as binding upon her, and she was made answerable for the profits she received.(g)

21. But Sir Thomas Plumer, in a case before him, inquired whether there was any case in which a husband and wife having a power of appointment by deed over the wife's estate, a paper not executed *modo et forma* pursuant to the power, was held to take effect as an appointment. With a married woman, he said, there can be no binding contract: the instrument is not good as an agreement, then how can it be said to bind her? She had a power to convey by deed, attested by two witnesses: her disability as a married woman was taken away as to that mode of proceeding, and she might by an instrument, executed with the required formalities, point out the uses to which the estate was to be conveyed. But where the instrument is not executed according to the power, it is nothing but an agreement signed by a married woman, and as an agreement, is invalid. This was a
[*97] point upon which he did not mean to *give a definitive

opinion, because it was not necessary for the decision of the cause ; but he felt that there would be very great difficulty in extending the doctrine of the Court as to defective executions to instruments signed by married women : it would be introducing quite a new line of cases. The power gives a competency to act, with certain protections ; but it was a very weighty question whether it could be held that that gave a general competency. *(h)*

22. These observations were extra-judicial, and it is clear that they were not intended to apply to cases of defective executions as well as to contracts resting in *feri*. It would indeed be difficult to distinguish the cases upon the reasoning ; for if the woman's disability is only removed *modo et formâ*, as prescribed by the power, then a sale and actual conveyance to a purchaser defectively executed would not be aided in equity, nor of course would a defective execution in favour of a child ; but it admits of no doubt, that a defective execution of a power by a married woman may be aided. *(i)* In the case of a contract by her, the relief it granted would be against herself. In the common case of a defective execution for a favoured object, the relief would be against the person taking in default of appointment.

23. In *Stead v. Nelson*, *(k)* a contract under her hand to secure a debt by mortgage by a married woman, having a legal estate for life for her separate use, with power to appoint it by writing under hand and seal, was held to be binding. The case of *Martin v. Mitchell* was not adverted to ; and although she had an express power to appoint, yet the property was settled to her separate use.

24. The character of purchaser, wife, creditor, child, must be borne by the party claiming relief in relation to the donee of the power, and not to the person creating *the [*98] power. Lord Hardwicke indeed supported a defective execution of a power by a wife, for the payment of her deceased husband's debts as well as her own. *(l)* The power was created by their marriage settlement, for the survivor of them by will to

(h) *Martin v. Mitchell*, 2 Jac. & Walk. 413. See *Dillen v. Grace*, 2 Scho. & Lef. 456.

(i) See *Doe v. Weller*, 7 Term Rep. 480.

(k) 2 Beav. 245; *Wainwright v. Hardisty*, 2 Beav. 363.

(l) *Wilkie v. Holmes*, 9 Mod. 465; 1 Dick. 165.

raise a sum of money for the purpose of paying the debts of the husband and wife, or either of them, or making a provision for the younger children of the marriage. He said, it had been objected that the debts which were to be paid by means of this power were the debts of the husband, whereas the estate was originally the wife's : but those debts, he observed, were expressly provided for by the deed of settlement.

25. This seems to introduce a new principle. If the power had been general, an execution of it in favour of her husband's creditors, if defective, could not have been supported in equity ; for there was no contract or consideration, and the creditors had no claim upon the wife. If the naming of the object or the party *in the power* varies the case, then the principle of the rule is not followed. Unless the power would authorize the appointment if duly made, no defect can be aided. Where is, then, the distinction between a power authorizing generally an appointment to any one, and a defective appointment under it to a volunteer, and a power expressly authorizing an appointment to a volunteer *nomination* to whom a defective appointment is made ? In each case the power authorizes the act : in neither does it confer any right upon the object of the power. It simply enables the donee to confer a benefit upon him. In either case, therefore, it would seem that the same question arises, Does the appointee fill such a character as entitles him in equity to have a defect supplied ? It is singular, that in the very sentence before he pronounced this opinion, Lord Hardwicke, referring to *The Duke of Marlborough v. Godolphin*, observed, there was no consideration of merit there

to make the Court supply the defect : and yet there the
[*99] objects were "the testator's own children, in whose favour

he had given a power over a large fund to his wife, who was not their mother. In delivering judgment in the *Duke of Marlborough's* case, he said, Lady Sunderland had several ways to execute the power, by deed or instrument in writing, or by a proper will ; but he was of opinion, whichever way she took to make any of the children of the testator take by virtue of it, it must be a complete act done by her, and that an imperfect act in execution of this power would not make any part of this money vest in any of the persons to take under it ; for it was admitted by the counsel there was no purchaser, no greater merit in one

than the other, all being volunteers, and therefore no ground to supply any defect in the execution of the power. She had chosen to execute it by will, and he was of opinion that this act of hers in execution of her power must be considered as a will.

26. Where a man makes even a voluntary settlement, vesting the property in a trustee, and ties himself down to a specified mode of revoking it, equity will not presume that he intended to revoke the settlement by the acceptance of a conveyance to himself not expressing any such intention; and if there is any neglect of the solemnities required, yet equity will not supply the want of them, for the settlor is entitled to no aid; but if he desire to regain the property, he must pursue his power.

27. This was decided in *Ellison v. Ellison*,^(m) where a man in effect transferred a moiety of a leasehold estate to a trustee, upon trust for himself for life, and afterwards for others, with a power to revoke and limit new trusts by deed or writing executed in the presence of two witnesses. About a year afterwards, the trustee, (who was the owner of the other moiety), in consideration of the settlor having paid half the expenses of the estate, assigned to him a moiety of the estate for his own proper use for ever. The deed was not executed as required by the power, and did not recite the settlement. Lord Eldon observed, [*100] that the settlor had said he put that restraint upon his own power, not only that he shall not have a power of revocation whenever he changes his intention, but that he shall not execute that power, nor be supposed to have that change of intention, unless manifested by an instrument executed with certain given ceremonies. His opinion was, that if there was nothing more in the transaction than taking out of the trustee the estate clothed with a trust for others, and that was done by an instrument with no witness or only one witness, it was hardly possible to contend that such an instrument would be a revocation according to the intention of the party, the evidence of whose intention is made subject to restrictions that are not complied with. He did not think, consistently with the intention expressed in the first instrument, and the necessity imposed upon himself of declaring a different intention under certain restrictions, *that if a different intention appeared clearly upon the face of the instrument, the latter*

(m) 6 Ves. jun. 656.

[*instrument*] would have controlled the former. But he did not think his acts did manifest a different intention.

28. That a defective execution cannot be aided in favour of the settlor himself, was also decided in *Sergison v. Sealy*.⁽ⁿ⁾ There a woman had power to appoint 4,000*l.* by deed or writing, signed in the presence of three witnesses. She by marriage articles, attested by two witnesses only, covenanted that her intended husband should have a certain interest in 2,000*l.*, part of it; but as to the other 2,000*l.*, it was covenanted that she should have that to her separate use. The contract was deemed a valid execution of the power in equity, in favour of the husband. But Lord Hardwicke said as to the remaining 2,000*l.* it fell under a different consideration, for it was not a covenant for the execution of the power; for in it the husband was to take nothing, nor the issue. She was to have it for her separate use as be-
[*101] fore, *and then it came to the same case if she had executed a writing making this appointment and executing this power voluntarily, without consideration, before two witnesses only, where the power requires three, which is a void execution, and the Court never supplied these defects unless for a valuable consideration.

29. In *Arundell v. Phillpot*,^(o) a woman made a voluntary settlement, with a power to revoke upon the tender of a guinea, and then made another voluntary settlement, and the parties claiming under the latter being upon a first trial unable to prove a tender, they filed a bill to have the defect supplied. But the Court said, it might supply an informal or defective revocation, but could not make a revocation where there was none; and therefore, the Court added, either prove a tender of the guinea, or that she declared she intended to revoke the former settlement: one or other of them shall be sufficient, though it hath not all the formalities and circumstances mentioned in the power of revocation, so it appears to be a sober solid act, and done *animo revocandi*: but that could not be made out. It was then insisted that the subsequent deed should be taken as a sufficient revocation, being of the same land, and made to different uses, but that was not allowed.

(n) 9 Mod. 390; 2 Atk. 414, where it is not accurately reported.

(o) 2 Vern. 9; Cha. Ca. 70. 93. 108; 3 Mod. 142.

30. In this case the contest, it seems, was between two volunteers, for the settlor was dead, without issue. Of course no defect could have been supplied in her own favour, for that would have been simply to give her a different power from the one created. And notwithstanding what is reported to have fallen from the Court, it is clear, on the one hand, that no declaration of hers of her intention to revoke would have enabled the Court to supply a defect in favour of a volunteer, and on the other, that the actual resettlement of the property would have compelled equity to supply the defect of the tender, if the resettlement had been upon persons entitled to the aid of the Court.

31. We have seen that this equity extends to [102] *creditors*; and where a man, having a general power of appointment, duly executes it in favour of a stranger, equity will lay hold of the funds in the hands of the appointee, for the benefit of the creditors of the person executing the power: *(p)* but where the power is *not* executed, equity cannot assist the creditors. *(q)* Upon this doctrine, Lord Erskine, in the case of *Holmes v. Coghill*, started an ingenious question, whether, if the power be informally executed in favour of a stranger, equity can first grant the relief at the suit of the creditors, so as to vest the fund in the appointee, and then convert him into a trustee of it for creditors; and he appeared to think that this might be done. *(r)* There is no authority however, for this circuitous relief, and it may well be doubted whether it will ever be granted. Where the fund is *effectually* given to a stranger, equity considers him a trustee of it for the creditors, and the remainder-man has no ground of complaint, because the power is legally executed. Where a defect is supplied for the appointee, the relief has at least the merit of effectuating the intention of the person executing the power, although at the expense of the remainder-man; but if this relief should be afforded in favour of creditors, where the fund is not given to them, the same hardship would be imposed on the remainder-man, and at the same time the intention of the donee of the power would be defeated.

(p) Vide. ch. 8, s. 3.

(q) Vide *infra*, sect. 6.

(r) *Holmes v. Coghill*, 12 Ves. jun. 206.

Upon this head of equity it is clearly established that the interests of the remainder-man shall only be sacrificed to the intention of the donee of the power expressed in favour of a person from whom a valuable consideration moved, or in whose person a good consideration existed. The first point to be established is the intention of the person executing the power, which in this case is not merely wanting, but his intention expressly was, that his creditors should not have the fund. The common [103] equity in favour of creditors, where the fund is given to others, does not arise until the power is legally executed. The limits of the law on this head appear to be contained in the decided cases.

32. Although the appointee may *primâ facie* be entitled to the aid of the Court,(s) yet to prevail he must have a preferable equity to the person against whom he seeks the relief. Therefore, where a father agreed to settle an estate on his wife and children, but neglected to do so, and afterwards prevailed upon his eldest son, who was ignorant of the agreement, to settle the estate in a different way, whereby the father had a power of jointuring, which upon his second marriage he agreed to execute, the agreement after his death was agreed to be specifically executed by the son, who was the remainder-man under the settlement; but this decree was reversed in the House of Lords.(t)(1) The son was seised of the legal estate, and he had as good an equity to retain the estate discharged of the jointure, as the wife had to have the defect supplied.

33. So, although there is a meritorious consideration in the appointee, yet if the donee of the power, after a defective exe-

(s) See *Shadwell's case*, 1 Ves. 281, cited; and see *Hervey v. Hervey*, 1 Atk. 568.

(t) *Jevers v. Jevers*, Dom. Proc. 1734.

(1) The principle in the text is clear, and *Jevers v. Jevers* is stated in Gro. and Rud. of Law and Equity, p. 19, as having been decided on the ground of the fraud in the father; but from the printed cases it appears that the settlement was made in consideration of the son waiving the agreement entered into upon his mother's marriage, and the bond for settling the jointure had no reference whatever to the power, upon which perhaps the case turned. However, the author of the above book, who lived in the time when the decision was made, most likely knew the ground to which the decision was generally referred. The above case is in 4 Bro. P. C. 199, by the name of *Ivers v. Ivers*, which difference arose from the printed cases. In the appellant's case, the cause is entitled *Jevers v. Jevers*; in the respondent's, *Ivers v. Ivers*.

cution of it, *legally* execute it in favour of a *bonâ fide* purchaser or mortgagee without notice the Court cannot interfere ;
 *for by the last execution the purchaser obtains the [*104] legal estate ; and as he has equal equity with the first appointee, he cannot be disturbed. But if, previously to his paying his money, or to the execution of the power, he has notice, either expressed or implied, of the prior appointment, equity will compel him, on the ground of fraud, to convey the estate to the first appointee, so as to make good the defect in the appointment to him.(u)

34. And even an appointee who takes by force of a valid execution, may be relieved against in favour of a person having a title to relief. Thus if a power is well executed by will, and then the donee agrees by act *inter vivos* for sufficient consideration to execute the power ; the will is not revoked at law, and the devisee, the appointee, will take the estate under it, but he will be compelled to make good the subsequent defective execution.(x) He is a mere volunteer, and the subsequent agreement was in equity a revocation of the will.

35. But if a limited power be badly executed, a purchaser from the appointee cannot set it up. The payment of a money consideration cannot make a stranger become the object of a power created in favour of children. He can only claim under a valid appointment executed in favour of some or one of the children. An appointment at first impeachable as voluntary may *ex post facto* be turned into an appointment for a valuable consideration, but that is where a valuable consideration was all that was wanting to have made it good *ab initio*. As in the case of an appointment of property over which he has a power unlimited as to objects, he who pays a consideration to the voluntary appointee, may constructively be held to be in the same situation as if he had in the first instance paid it to him by whom the power has been executed.(y)

36. These observations, however, although they bear upon the general principle, apply to cases not of defeat- [*105]
 tive execution, but of executions which might be defeat-

(u) As to what amounts to notice, see 2 Treat. Purch. 276, ch. 17.

(x) Cotton v. Layer, 2 P. Wms. 623.

(y) 1 Mer. 638; per Sir W. Grant.

ed, or the benefit of them taken away, unless sustained by the claimant filling the character of a purchaser.

37. Where a power is defectively executed for a favoured class, it is altogether unimportant that persons claiming under the settlement creating the power, or persons claiming under them, are purchasers. In nearly all the cases the remainder-man against whom the defect is supplied is a purchaser, but he originally took subject to the power, and in equity the defective execution is treated as valid, and therefore the remainder-man is charged with it, although a purchaser. Where a *boni fide* purchaser for money obtains the estate not under an execution of the power, but subject to the power, and estate created under it, but buys upon the faith that the power has not been executed, a question of some nicety would arise if there was a defective appointment, viz. whether he could be compelled to make it good. Perhaps, as he buys subject to the power, he would be held liable to all the consequences. If a different rule were to prevail, a remainder-man under a settlement might easily defeat in many cases the equitable right of persons claiming under an execution of the power.

38. Lord Nottingham, in *Smith and Ashton*,^(z) made good a defective appointment in favour of younger children, against the heir of the settlor, who took under the voluntary settlement by which the power was created, against the wife of the son and his eldest son, who claimed as purchasers under him by his marriage settlement, and they had no notice of the defective appointment. No doubt this was fully warranted by the rules of the Court. In the report in *Chancery Cases*, Lord Nottingham, it appears, added,—but a purchaser shall defend himself in such [*. 106*] case, but with difference though not executed according to the circumstances, for if he had notice he purchased at his own peril.

39. The Reporter queries if Lord Nottingham meant notice of the original conveyance only, or the ill-executed estate. He must, it should seem, have meant of the original settlement; for if he had notice of the defective appointment, of course he would be bound by it; and such a case would hardly have been stated as an exception, where the power was being enforced against per-

(z) 1 Cha. Ca. 263, 264; Finch, 273; 1 Freem. 108; 3 Cha. Ca. 69. 106.

sons filling the character of purchasers, who had notice of the settlement creating the power, but had not notice of the defective execution of it.

40. But where a man seised in fee of large estates, and with a power of appointing a jointure over estates of small annual value, entered into a bond to settle in jointure 300*l.* per annum of lands in three counties, of that value, and no particular lands named, and afterwards devised away the fee-simple lands, so that they were subject to the bond debt; it was held, that persons claiming under the marriage settlement of the remainder-man as purchasers, though with notice of the power, were not bound to give effect to the covenant out of the power. The Lord Chancellor said, the two parties were equally purchasers, and this power [covenant] being a general power [covenant] to make a jointure, and not said of what lands in particular, was not such a lien upon the lands as should affect a purchaser, *though the power had been afterwards executed*, much less where it is not executed at all. This opinion seems to have rested upon the ground that the *covenant* was general, and therefore not a lien upon the lands in the power, *(a)* or, in other words, not a contract to execute the power; for upon the first hearing the L. C. was of opinion that the power, if defectively executed, would have been aided. There is an error in the further statement of the judgment; for if the power had been executed by the tenant for life, even after the settlement by the remainder-man, it would by [*107] its own force have bound all persons claiming under him, without regard to their character as purchasers. *(b)*

41. An attempt was formerly made to confine the relief to persons claiming under settlements for valuable consideration. In *Lady Hooke v. Grove*, *(c)* a husband having made a settlement of estates of which he was tenant in tail, pursuant to articles, then voluntarily appointed an additional jointure under a power, and Lord Harecourt, C., decreed it to be paid. But the counsel for

(a) See accordingly, *Parker v. Serjeant, Finch*, 146.

(b) *Elliot v. Hele*, 1 Vern. 406, (1686); 2 Cha. Ca. 29 (1680) stood over to amend the bill; 2 Cha. Ca. 87 (1682), appears to be an elaborate argument for the widow. The great point was, whether the fee-simple lands were bound in the hands of the devisee; and the observations in *this* report of the case, as to purchasers, apply to the fee-simple estate.

(c) 5 Vin. Abr. 293, pl. 40; 12 Ann.

the remainder-man moved that the power was not well executed at law, and being a voluntary settlement it ought not to be aided in equity. To which the Lord Chancellor said, he saw no reason why a defective execution of a power for the benefit of the wife, though otherwise provided for, should not be aided in a court of equity, as well as want of a surrender of a copyhold, in case of a devise to a child who hath another provision by the will: but since it was insisted on that there was no precedent in this Court of supplying a defective execution of a power in case of a voluntary execution, he gave leave to try the validity of the execution of the power at common law, and retained the bill until it was determined at law. This decree was affirmed in the House of Lords, and as there is no further trace of the case, probably the jointure was paid without further contest. The point at all events is now a settled one. Lord Hardwicke observed, in *Hervey v. Hervey*, that if the wife had claimed in that case, without setting forth any consideration, but merely as a voluntary gift from the husband, there was no doubt but the Court would have given it to her. *(d)*

[*108] *42. So in *Churchman v. Harvey*, *(e)* where the power was contained in a settlement for a valuable consideration, and was executed, but defectively, for a wife after marriage, Lord Commissioner Willes observed, that it was said she was a volunteer, and that the plaintiffs having the law on their side, equity would not interfere; but he was of opinion she was a purchaser under the power, which was created by a settlement made on valuable consideration. She was a purchaser of the jointure by marriage, which of itself is a valuable consideration, so that she was doubly a purchaser of her jointure: and though it was made after marriage, yet it was a very strong case: the power was to jointure before or after marriage.

43. Upon this subject of equitable relief a question has often arisen, whether a party be entitled to the relief who is already provided for; but it is well settled, that of the *quantum* of provision the parent or husband is the best judge. *(f)* It has, how-

(d) 1 Atk. 544.

(e) Ambl. 339.

(f) *Kettle v. Townsend*, 1 Salk. 187; *Andrews v. Waller*, 6 Vin. Ab. 237, pl. 12; *Tudor v. Anson*, 2 Ves. 582; *Smith v. Baker*, 1 Atk. 385; *Chapman v. Gibson*, 3 Bro. C. C. 229; and *Barnard*, C. C. 113, per Lord Hardwicke.

ever, been long *vexata questio*, whether a surrender can be supplied against *an heir totally unprovided for*.(g) In Chapman and Gibson, Lord Alvanley considered that the heir could not be relieved against. The principle, he said, must be this; that the testator being under an obligation to do an act, we will compel the heir to perfect it: but we will not compel him to fulfil one obligation at the expense of another; and if the testator has totally forgot to make any provision for his eldest son, this shall be an answer to the claim of the wife or other children. In a late case.(h) Lord Rosslyn considered it equally clear that the Court could not enter into the question, whether the heir was or was not provided for; but it was not necessary to decide the point. Lord Alvanley, however, did not sub- [*109] scribe to Lord Rosslyn's doctrine, but still retained his opinion that an heir could not be compelled to supply the surrender, where he could show that the consequence would be (he being a son wholly unprovided for) that he would be compelled to fulfil the intention of his father in discharge of a moral or natural obligation in favour of a widow, or of his brothers or sisters, when it was manifest that he had neglected to discharge the obligation he was under of providing for him his eldest son.(i) This question, therefore, is still very doubtful; nor is it easy to conjecture which way it will be decided. Those who advert to principle will probably agree with Lord Alvanley, whilst those who regard practical inconvenience will coincide with Lord Rosslyn: for certainly endless difficulties will be introduced if the Court is to inquire into the circumstances of the heir-at-law.

44. It is clear, however, that this question can never arise where the heirs are persons for whom the testator is under no natural or moral obligation to provide, as, where the heir is a nephew, or niece.(k) or sister.(l) But if the inquiry is to be made, it should seem that a grandchild will be within the princi-

(g) *Kettle v. Townsend*, 1 Salk. 187; *Hawkins v. Leigh*, 1 Atk. 387.

(h) *Hills v. Downton*, 5 Ves. jun. 557.

(i) See App. No. 24, the observations of Lord Alvanley on Hills and Downton, written with his own hand; see *Fielding v. Winwood*, 16 Ves. jun. 90; *Rodgers v. Marshall*, 17 Ves. jun. 294.

(k) *Chapman v. Gibson*, ubi sup. *Smith v. Baker*, 1 Atk. 385.

(l) *Fielding v. Winwood*, 16 Ves. jun. 90.

ple, although a surrender, or a defect in the execution of a power cannot be *supplied* in his favour.(*m*) Lord Rosslyn has decided that daughters are provided for when married ; (*n*) nor is it necessary that the heir should be *disinherited*, for if he is provided for, it is immaterial from whom the provision moved.(*o*)

45. Important, however, as this question is, and frequently *as it will probably arise on copyholds, yet it is a point that can seldom occur in relation to powers. For questions as to aiding defective executions of powers generally arise upon particular powers in settlements, where the estate subject to the power is either settled on the heirs of the person creating the power, or on strangers : if it be settled on the heirs, then they are provided for under the settlement ; and if it be settled on strangers, *they* cannot require a provision : so that in either case the defect may be supplied, although it should be determined that the relief cannot be granted against an heir totally unprovided for. Indeed, in the case of *Carter v. Carier*,(*p*) Sir Joseph Jekyll, addressing himself to this point, said, that where a younger child comes into equity to have the want of surrender of copyhold supplied, he must be wholly unprovided for, or have but a very slight provision ; though there had been great variety of opinions upon this point, and where all the children have been well provided for, the Court has supplied the want of a surrender against the heir, because the father was the best judge in what manner to provide for his children ; and he believed Lord Cowper was the first who refused it, because the younger child was greatly provided for, and the heir had little or nothing ; *but he had never known this distinction made, or that the Court would enter into the consideration of it, where the younger child has applied to have a defective execution of a power made good.* It is impossible, however, to administer a different equity in these cases. They stand on precisely the same ground. We have Lord Alvanley's authority for this.(*q*) The same doctrine was laid down by Lord Chancellor King.(*r*) and adopted by Lord Camden.(*s*)

(*m*) See *Rodgers v. Marshall*, 17 Ves. jun. 294.

(*n*) *Hills v. Downton*, 5 Ves. jun. 557.

(*o*) *Hawkins v. Leigh*, 1 Atk. 387 ; *Chapman v. Gibson*, 3 Bro. C. C. 229 ; *Pike v. White*, ib. 286.

(*p*) *Mose*. 365.

(*q*) *Chapman v. Gibson*, 3 Bro. C. 229.

(*r*) *Cotter v. Laver*, 2 P. Wms. 623, third point.

(*s*) *Godwin v. Kilsha*, Ambl. 684.

46. In *Hervey v. Hervey*,^(t) a power of jointuring was badly executed in favour of the wife before marriage, and several defective appointments were made to her during the marriage, and Lord Hardwicke considered her as a wife unprovided for. [*111]

47. In *Mac Adam v. Logan*,^(u) a power was given to appoint a fund amongst *such* child or children of the marriage as the donee should choose, and in default of appointment the fund was given to all the children equally. The power was defectively executed, as the appointment was not sealed according to the power; and Lord Thurlow, it is said, seemed to think that the want of a seal could not be supplied between persons having equal equities, though it might against an heir-at-law or remainderman; but being all *children*, it was like a naked power. The case, however, was decided upon another ground; and it should seem that Lord Thurlow's opinion cannot be supported, for surrenders of copyholds and executions of powers in this respect go hand in hand; and it is well established, that as to copyholds, the same equity shall be administered against a younger son as against an eldest.^(x) Therefore, if the children are entitled in the same way as heirs in gavelkind, the defect will be supplied in favour of any of the children, in the same manner as in common cases it would be supplied against the heir-at-law.^(y) So if the case before Lord Thurlow had turned on that point, the defect ought to have been supplied on precisely the same principle; the mere circumstance of all the parties being children, was not material, for those to whom the fund was not appointed were *quoad* this relief remaindermen; and therefore, unless they were totally unprovided for, and Lord Alvanley's opinion were to prevail, they ought to have been decreed to make good the defect. Lord Chief Justice Holt may be thought to have been of the same opinion as Lord Thurlow. In *Montague v. Bath*,^(z) he put this case: a A man settles *all* his es-

(t) 1 Atk. 561.

(u) 3 Bro. C. C. 310.

(x) See 2 Vern. 615; and *Drake v. Robinson*, 1 P. Wms. 443.

(y) *Bradley v. Bradley*, 2 Vern. 163; *Andrews v. Waller* 6 Vin. Abr. p. 237, pl. 12.

(z) 3 Cha. Ca. 55; and see 2 Ves. 75; *Edwards v. Edwards*, 3 Madd. 197; *Jacob*.

tate upon his younger son for life, with a power to revoke: and then, by defective execution, he gives all the estate to his eldest son: is this a good revocation in equity? And he answered, No; for the one is as nearly related to the father as the other; the considerations are equal; the one is as much the son as the other and therefore there is no great difference between them; and the younger son, who hath the estate by law shall enjoy it, though afterwards it shall return back to him that was the eldest. Now as Holt put this case, it embraced *all* the ancestor's estate; so that if the defect had been supplied, the younger son would have been totally unprovided for; and this must have been the ground of Holt's opinion; for if his opinion were to be adopted as a general rule, it is evident that the Court would never supply a surrender against an eldest son, in favour of younger children; indeed, the same argument precisely was formerly urged against supplying a surrender to the prejudice of an eldest son: it was insisted, that he was as nearly related as his brother, and having the law on his side, equity ought not to interpose: (a) but this doctrine never gained a footing. In a recent case, the equity was established in favour of an eldest against younger children; (b) and in a later case where the fund in default of appointment was given to the children equally, but the shares of the daughters were to be for their separate use, and to go to their children, a defective execution of the power equally but absolutely was aided by the Court. (c)

48. If under an *equitable* settlement, a power of charging money for his own use be given to tenant for life, and he covenant to discharge the estate from certain incumbrances on it, [*113] it seems that an execution of the power for "valuable considerations, *before breach of the covenant*, would be enforced in equity, although it should be afterwards broken; as the person lending the money ought to have inquired whether the covenant was performed; and clearly, a person not actually advancing money on the faith of the power, but obtaining an execution of it after breach of the covenant, to patch up a former

(a) See *Fothergill v. Fothergill*, 2 Freem. 257.

(b) *Hume v. Randell*, 6 Madd. 331.

(c) *Lucena v. Lucena*, 5 Beav. 249.

security, will not be entitled to the aid of equity against the remainder-man, who takes the estate charged with the incumbrances of which it ought to have been cleared. (*d*)

49. If a man execute a power in favour of a child, and covenant for a good title, and damages be recovered at law on the ground of the invalidity of the appointment, yet he may be relieved in equity, on executing a valid appointment. (*e*)

50. We may here observe, that the act for the abolition of fines and recoveries has altogether excluded the equitable jurisdiction from supplying defects in the execution either of the powers of disposition given by the act to tenants in tail or of the powers of consent given by the act to protectors of settlements, and the supplying, under any circumstances, of the want of execution of such powers respectively, and in regard to giving effect in any other manner to any act or deed by a tenant in tail, or protector of a settlement, which in a court of law would not be an effectual disposition or consent under the act. (*f*)

(*d*) *Bradbury v. Hunter*, 3 Ves. jun. 187. 260.

(*e*) *Whaley v. Morgan*, 2 Dru. & Wals. 330.

(*f*) 3 & 4 Will. 4, c. 74, s. 47.

[*114]

*SECTION II.

OF THE RELIEF WITH REFERENCE TO THE INSTRUMENT EXECUTING
THE POWER.

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| <p>2. Agreement to create a power, if for consideration, defect aided.</p> <p>5. Defective execution aided if reduced to writing—covenant, contract, will, letters.</p> <p>6. Recital sufficient.</p> <p>7. Answer in Chancery sufficient.</p> <p>8. Covenant in the settlement creating the power sufficient.</p> <p>9. Sale and payment sufficient.</p> <p>10. But there must be a clear reference to the fund.</p> <p>11. Contracts enforced as defective executions.</p> <p>13. Contract to exercise a power when in possession, enforced.</p> <p>14. Coventry v. Coventry; contract under the power or otherwise.</p> <p>15. Deficiency in quantity of jointure lands made good.</p> <p>16. Husband not entitled to wife's portion till jointure secured, as agreed.</p> <p>17. Parol contract not binding on remainder-man.</p> <p>18. Unless when in possession, he lie by and allow expenditure.</p> <p>19. Parol lease from year to year void against remainder-man.</p> | <p>20. Contract, if a breach of trust, relieved against.</p> <p>21. To make a lease not warranted by the power not enforced.</p> <p>22. Unless a performance pro tanto would be valid.</p> <p>23. Remainder-man may enforce the contract of tenant for life.</p> <p>24. Defective formal instruments aided, as</p> <p>25. Will instead of a deed.</p> <p>26. Three witnesses instead of two.</p> <p>27. Will not under seal as required.</p> <p>28. Now altered by 1 Vict. c. 26.</p> <p>29. Observations on the Act.</p> <p>30. Power itself rectified in a settlement.</p> <p>31. No relief contrary to intention of creator of power: as deed instead of a will.</p> <p>32. Or where trustees sell the estate, and the tenant for life the timber.</p> <p>33. Or the interest determined according to the power and the appointment.</p> <p>34. Relief where too much included for jointure.</p> <p>36. Or a different interest created to secure it.</p> |
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1. HAVING considered for whom a defect will be supplied, we must now consider in what cases it will be made good *with reference to the instrument*.

2. We may premise that where a power is agreed to be *created*, or is attempted to be *created*, by a defective instrument, [*115] the agreement will be enforced, or the defect supplied if there is a sufficient consideration to support the agreement or defective instrument: but this is without reference to the person in whose favour the power may have been executed. One of the earliest instances of the interference of the

Court was cited by Lord Nottingham in *Smith v. Ashton*; (g) it was in Lord Ellesmere's time; where a man had made a feoffment to the use of himself for life, with power to make leases, &c. and in the deed there was a covenant that if livery were not made he would stand seised to the use aforesaid; afterwards he makes leases, and dies without making any livery. It was held that the leases should stand good by virtue of the power; for although the power could not be executed and stand good out of those uses raised by virtue of the covenant to stand seised, neither could they be executed by the feoffment, no livery having been made, yet because it was clear that such a power was intended to the party, though there were a defect in the execution of the estate, this shall not invalidate the estates raised out of the power.(1)

3. Upon this ground we have seen that an agreement upon a marriage to settle a woman's estate, so as to give her a power of appointment over it during the coverture, is treated in equity as an actual conveyance, so as to enable her to appoint and to compel her heir to make good the appointment.(h)

4. We may observe that where there are several defective executions, equity will supply the defect in the last, in order to effectuate the intent of the parties.(i)

5. And it is only necessary that the intention to execute the power should appear clearly in writing; whether the donee of the power only covenant to execute it, (j) or by his will desire the remainder-man to create the estate; (k) or ['116] merely enter into a contract, not under seal, to execute his power; (l) or by letters promise to grant an estate which he

(g) *Prince v. Chandler*, 1 Freem. 308; 1 Cha. Ca. 263; and the Countess of Oxford v. Lady Bruce, 1 Freem. 308.

(h) Vide supra, vol. I, p. 188.

(i) *Hervey v. Hervey*, 1 Atk. 561; *Barnard. C. C.* 103; 9 Mod. 253.

(j) *Fothergill v. Fothergill*, *ubi sup.*; *Lady Beaufoy's case*, 2 Vern. 465, cited, *Alford v. Alford*, 2 P. Wms. 230, cited; 4 Bro. C. C. 466; *Coventry v. Coventry*, *Francis's Max last case*; 2 P. Wms 222, *Gilb. Eq. Rep.* 160; 1 Str. 596; 9 Mod. 12; *Sargeson v. Sealey*, 2 Atk. 412; and see 15 Ves. jun. 173.

(k) *Vernon v. Vernon*, Amb. 1.

(l) *Shannon v. Bradstreet*, 1 Rep. temp. Redesdale, 52; and see *Mortlock v. Buller*, 10 Ves. jun. 202; and see *Coventry v. Coventry*, *Max. Eq.* per Sir Joseph Jekyll; *Blore v. Sutton*, 3 Mer. 237.

can only do by an exercise of his power, (m) equity will supply the defect.

6. So, if in a marriage settlement of one of the objects, the donee recite that the object is entitled to a particular share of the fund, and she cannot take that share unless there be an appointment, that will be held a good appointment in equity, as it demonstrates an intention to give that share accordingly. (n)

7. So an answer to a bill in Chancery, which of course is a writing under the hand of the party, that is, signed by him, stating that "he does appoint, and intends by a writing in due form to appoint," the fund in a particular manner, was held to be binding although the power was required to be executed by writing under hand and seal attested by two witnesses. (o) It was argued that the donee had appointed upon oath and on record. The Master of the Rolls held that it was a defective execution. The answer says, he does appoint: so it is a present appointment; and the words, *and intends*, &c., do not derogate from that actual appointment, or show that he thought it would not avail, but only that he would afterwards execute it in the precise form. He compared the case to the admission by an answer of a parol contract, for he said he could have done nothing that would [*117] have made his intention to appoint more manifest than this answer. It was treated as a defective appointment which equity would aid.

8. And where a man made a settlement of an estate to uses in strict settlement, and reserved a power by deed or will, executed in the presence of two witnesses, to appoint any of the lands for raising portions for his younger children, to be paid as he should by such deed or will appoint, and by the settlement *covenanted to do so accordingly*, this covenant was held to be an equitable execution of the power, although he died without doing any further act. (p) This case evinces that the branch of equity on which it depended is not confined within very narrow bounds. Lord Eldon, in speaking of a power of jointuring, said, the donee

(m) See and consider *Campbell v. Leach*, Ambbl. 740; App. No. 4. 25.

(n) *Wilson v. Piggot*, 2 Ves. jun. 351. See *Poulson v. Wellington*, 2 P. Wms. 533

(o) *Carter v. Carter*, Mose. 365; 9 Mod. 256, cited. See For. 271; and see *Fortesque v. Gregor*, 5 Ves. jun. 553.

(p) *Doctor Sarth v. Lady Blandfrey*, Gilb. Eq. Rep. 166, cited.

could not get far wrong in equity, as, being for meritorious consideration, it would do in equity in almost any form in which that intention was clearly expressed.(q)

9. And whatever solemnities are required to the execution of the power, yet a sale of the funds, and payment of the produce, to the object of the power, at the request of the donee, is in equity tantamount to a valid legal appointment.(r)

10. But to enable equity to relieve, there must, as in the case of a regular execution.(s) be a sufficient reference to the fund to show the party's intention to execute the power, or the party must be in possession of no other fund upon which the covenant can operate.(t)

11. Contracts are considered as defective executions [*118] and, like them, require a sufficient consideration to enable the Court to act. The same rules, therefore, apply to each case. As against a remainder-man both are equally binding. The principal distinctions between them are, that a contract to execute a power might be enforced against the donee of the power himself(u) where a defective execution without any contract, although capable of being enforced against the remainder-man, could not be aided against the party who made it.

12. In *Coventry v. Coventry*, where the covenant upon marriage was to make a jointure under the power, or otherwise, and deeds were engrossed but not executed, the Court took this distinction, that if it had been a mere voluntary conveyance, the *animus deliberandi* should have continued until the conveyance was executed, but there being a contract to settle in pursuance of that power, where an estate is afterwards set out it shall be presumed to be an execution of that contract, which in conscience he was

(q) 18 Ves. jun. 414, 415. 423.

(r) *Routledge v. Dorril*, 2 Ves. jun. 357.

(s) Vide supra, ch. 6, sect. 7.

(t) *Jackson v. Jackson*, 4 Bro. C. C. 462; *Hele v. Hele*, or *Elliot v. Hele*, 2 Cha. Ca. 28, 29. 87; 1 Vern. 406 (I)

(u) See 1 Scho. & Lef. 59.

(I) In the report of this case in *Vernon*, the Chancellor takes up the objection as if the power was general, but this certainly could not have been an objection. It seems that it was the *covenant* which was general, and the covenantor had other hands besides those comprised in the power. Mr. Powell has noticed this inaccuracy. Pow. 183-187.

obliged to perform.(*x*) Contracts, therefore, to execute powers are within the general rule of equity, if there is a sufficient consideration: as it is a covenant for valuable consideration for a thing to be done, equity ought to take it as done:(*y*) and though in strictness the covenant or agreement is not an execution of the power, yet there being a valuable consideration, equity will supply the circumstances.(*z*) If, said Lord Redesdale, a person having a power executes an instrument for valuable consideration, he is understood *in equity* to engage with the person with whom he is dealing to make the instrument as effectual as he has power to make it, and it shall have that effect, so far as the person executing it has power to give it effect; and where the nature of the instrument is contrary to what the power prescribes, [*119] but that it demonstrates an intent to charge, it shall have the operation of charging in that form which the power allows.(*a*) In another case the same learned Judge observed that contracts for valuable consideration(*b*) to execute a power to make a charge of any description under a power are binding on the remainder-man. In the case in which he made the observation, it was attempted to call a contract to execute a power a case of non-execution, and to draw a distinction unfavourable to the former between a non-execution and a defective execution. In answer to this, he observed, that the argument was founded upon a mistake of the meaning of a non-execution: a power is said to be *not* executed where nothing is done; but a *defective* execution is where the power has not been executed according to the terms of the power, (for if it were executed according to the terms there would be nothing to be supplied); but where it has been intended to execute it, and that intention is sufficiently declared, but the act declaring the intention is not an execution of the power in the form prescribed, there the defect shall be supplied in equity. What stronger declaration, he asked, of an intent to execute a power can there be than a contract, which makes the party liable to damages for not executing it,

(*x*) 1 Str. 602.

(*y*) *Sergison v. Sealey*, 9 Mod. 390.

(*z*) *Cotter and Layer*, 2 P. Wms. 622.

(*a*) Per Lord Redesdale, 2 Ball and Beatty, 44.

(*b*) 1 Scho. & Lef. 60. 62, 63.

which may be enforced against him, and by which he may be compelled to execute the power in his lifetime? It struck him to be beyond the case of a voluntary charge for younger children, or for a wife, which, if [being] for meritorious consideration, have always been enforced against the remainder-man.

This equity we shall see extends to powers of every description, powers of leasing as well as others.(c)

13. Powers of jointuring, to be exercised when in possession, are frequently agreed to be executed by *remainder-men*, whose right of possession has not accrued, and equity will make good the appointment, if the party afterwards do actually *come into possession.(d) In such cases a covenant is [*120] a sufficient declaration of intent to execute, even when made before the power arises, for if the power is limited to be exercised by the tenant for life *in possession*, and he covenant that *when he comes into possession* he will execute, that is binding.(e)

14. In *Coventry v. Coventry*(f) where a devisee, with a power of jointuring to the extent of 500*l.* a year, upon a treaty for marriage, by articles in consideration of a marriage portion, covenanted that he or his heirs would after the marriage, according to his power, *or otherwise*, convey and appoint estates of 500*l.* per annum upon his wife for her jointure; and part of the estate was afterwards selected, and the appointment prepared and ingrossed, but never executed; Lord Chancellor Macclesfield, the Master of the Rolls, Baron Price, and Baron Gilbert, held that the articles operated as a lien upon the estates selected, in the hands of the remainder-man, and that the defect ought to be supplied. They considered the words "or otherwise" as auxiliary to the real lien, viz. that if his power should happen to be insufficient to settle 500*l.* a year, that then it should be done by some other means. It was true he had election to raise the jointure out of his own assets, or out of his power: but it seemed plain that he

(c) *Infra*, section 3.

(d) *Jackson v. Jackson*, *ubi sup.*; and see *Alford v. Alford*, 2 P. Wms. 230, where Francis survived Thomas. See 4 Bro. C. C. 466; and see 1 Rep. t. Redesdale, 63, *infra*, ch. 16.

(e) 1 Scho. & Lef. 63.

(f) *Coventry v. Coventry*, 2 P. Wms. 222, *et ubi sup.*

intended to raise it out of his power and the deed prepared was sufficient to show that intention.

15. The same relief is afforded in cases where the power is actually executed, but lands to the value agreed to be settled by the articles are not comprised in the power. The wife will be relieved against the remainder-man to the extent of the deficiency, (g) for articles are executory, and there is no difference between articles unexecuted *in toto*, or in part only; [121] nor is it material in these cases that the appointee has taken a collateral covenant from the donee of the power that the lands are of the stated value. (h)

16. If the husband is to become entitled to the wife's fortune in consideration of the jointure, and the wife cannot obtain the jointure, she will be entitled to retain her property against her husband: (i) while the obligations of the husband remain unperformed, neither he, nor any person claiming under him, will be permitted to receive any part of the wife's fortune upon any other condition than that of making good the settlement. (k)

17. Where the contract to execute the power is merely by parol, it seems that it will not bind the remainder-man, *although it is in part performed* by the intended appointee; as, where a lease is agreed to be granted by parol under a power, and the lessee expend money in improvements during the life of the person who agreed to grant the lease. (l) In *Carter v. Carter*, (m) the Master of the Rolls thought that a parol appointment would not be good in equity, even before the statute of frauds. It is, Sir W. Grant observed, considered as a fraud in a party permitting an expenditure on the faith of his parol agreement to attempt to take advantage of its not being in writing. But of what fraud, he asked, is a remainder-man guilty, who has entered into no

(g) *Marchioness of Blandford v. Duchess of Marlborough*, 2 Atk. 542.

(h) *Lady Clifford v. Earl of Burlington*, 2 Vern. 379. This case was not entirely approved of by the Master of the Rolls in *Evelyn v. Evelyn*, 2 P. Wms. 668, but is confirmed by Lord Hardwicke's opinion in the *Marchioness of Blandford's* case.

(i) *Holt v. Holt*, 2 P. Wms. 648.

(k) *Mitford v. Mitford*, 9 Ves. jun. 87.

(l) *Shannon v. Bradstreet*, Rep. t. Redesdale, 52: *Blore v. Sutton*, 3 Mer. 237; *Lowry v. Lord Dufferin*, 1 Ir. Eq. Rep. 281.

(m) *Mose*. 365.

agreement, written or parol, and has done no act on the faith of which the other party could have relied?

18. But if after the death of a lessor under a power the remainder-man, with full knowledge of the defect, lie by, and suffer the lessee to improve the estate by rebuilding or *otherwise, equity will, on the ground of fraud, compel [*122] him to grant a new lease to the lessee;(*n*) but in such a case if the covenants and conditions are improper ones, the Court will reform them.

19. In 1781, Lord Kenyon gave an opinion, that a lease by *parol* from year to year, by tenant for life with a power, was, since the case of *Leach v. Campbell*, binding in equity on the remainder-man; and that consequently the executors of the tenant for life, who died in the middle of a half-year, were not entitled to an apportionment, but the rent would go to the remainder-man;(*o*) he added, that he believed this point had been determined, and that some time ago he concurred with Mr. Dunning and Mr. Maddocks in an opinion to the effect of that he had then given. In a late case the very point arose, but it was not necessary to decide it.(*p*) The opinion of the Court, however, appeared to be, that the remainder-man was not bound by the lease, and therefore was not entitled to the rent. And in a later case it was decided that the lease is not binding on the remainder-man and therefore the rent is apportionable.(*q*)

20. And where trustees with a power of sale enter into a contract for sale of the estate, which would be deemed a breach of trust, equity will not only refuse to interfere in favour of the purchaser, but will, even at the suit of the *cestui que trust*, restrain the trustees from executing the contract, and the purchaser will be left to his remedy at law.(*r*)

21. So where a man, with a power of leasing for twenty-one years at rack-rent, agreed to execute a lease for twenty-

(*n*) *Stiles v. Cowper*, 3 Atk. 692; *Blore v. Sutton*, *ubi sup.*; *vide infra*, sect. 4.

(*o*) This opinion is now printed, 1 Swanst. 351. n.

(*p*) *Billing v. Earl of Macclesfield*, Rolls, 5 Feb. 1807, MS.

(*q*) *Ex-parte Smyth*, 1 Swanst. 337, S. C. MS.; *Clarkson v. Lord Scarborough*, 1 Swanst. 354, n.; *Symons v. Symons*, 6 Madd. 207.

(*r*) See *Mortlock v. Buller*, 10 Ves. jun. 292; and see *Stratford v. Lord Aldborough*, 1 Ridg. P. C. 281; *Brian v. Acton*, 5 Vin. Abr. 533, pl. 33.

[*123] one *years, and a further lease for twenty-one years at any time during his life, consequently to execute a lease for twenty-one years, whatever might be the increased value of the property at the time of the lease granted; there were other points in the cause, but Lord Redesdale considered this to be an agreement to act in fraud of the power, and held that the purchaser was not entitled to a specific performance even *pro tanto*. He thought that courts of equity should never enforce such contracts, whether with a view to the party himself or to the person entitled in remainder. In the first place, it is unconscionable in the tenant for life to execute such a lease, because it brings an incumbrance on the estate of the remainder-man, and puts him to litigation to get rid of it; and as to the tenant for life, it is compelling him to do what is to be the foundation of a future action for damages if he die before the twenty-one years. The Court will never do this, but will leave the party at once to bring his action for damages. And he also conceived that this sort of contract, obtained by a person who knew at the time the nature of the title, is unconscionable in him, as he makes himself a party knowingly to that which is a fraud on the remainder-man, and, under such circumstances, he has no claim to the assistance of a court of equity.(s)

22. It seems, however, open to contend, that if the lessee is willing to take such a lease as the party can grant without risk to himself or injury to the remainder-man, equity must specifically perform the agreement *pro tanto*.(t) But where the party cannot grant the lease required so as to bind the inheritance, the Court will not decree a specific performance by directing an invalid lease to be executed, which might encumber and embarrass those entitled to estates in remainder.(u)

[*124] *23. And here it must be observed, that as a contract to execute a power will bind the remainder-man, so where it can be executed in his favour, as in the case of an agreement to grant a lease, or sell an estate, the Court will com-

(s) Harnett v. Yielding, 2 Scho. & Lef. 549. See Corry v. Corry, 1 Wall. & Lyne. 278.

(t) See Treat. Purch. vol. 1, 209. 306.

(u) Ellard v. Lord Llandaff, 1 Ball & Beatty, 241; and see O'Rourke v. Percival, 2 Ball & Beatty, 58, which was treated as a case of fraud; Thomas v. Dering, 1 Kee. 729; Dowell v. Drew, 1 You. & Coll. C. C. 345.

pel the execution of it on his behalf, (x) although this seems formerly to have been doubted; (y) but where the power is to lease in possession, the agreement will not be binding unless the donee of the power survive the period when the lease is to commence. In some cases this equity may be very beneficial to the remainder-man. Suppose a power to make a jointure not exceeding 1,000*l.* per annum, with a proviso, that if there were no execution of the power, and if the tenant for life should die leaving a widow, she should have 500*l.* per annum; and suppose a contract made upon the marriage of the tenant for life to charge 400*l.* for her under the power, which would be a less provision than she would have if the power had not been executed: [*125] Lord Redesdale, who put this case, conceived that the widow could not say she was not bound. (z)

24. In none of the cases we have yet examined was the power attempted to be legally executed by a formal instrument, in a manner required by the power. The same relief, however, is granted,

(x) *Shannon v. Bradstreet*, 1 Sch. & Lef. 52; *Lowe v. Swift*, 2 Ball & Beat. 529.

(y) *Stamford v. Omy*, 1 Rep. t. *Redesdale*, 65, cited; and *Campbell v. Leach*, Amb. 749. (1)

(z) 1 Sch. & Lef. 63, 64.

(1) In this case Lord C. J. de Grey, after holding that the *lessee* might enforce the contract against the remainder-man, is made to say, "And I do not know that the remainder-man could on his part enforce the contract of such tenant for life. I had at first some doubt of this point, but own myself satisfied by what was said in answer." In a late case Lord Redesdale said, that he suspected these additional words were not uttered by the Lord Chief Justice; *Shannon and Bradstreet*, *ubi sup.* It is evident, however, that they were; and it seems clear that his opinion was exactly contrary to what it is stated to have been. It is manifest, from the frame of the sentence, that he said he did not know that the remainder-man could *not* enforce the contract. This will appear clearly on a perusal of the whole sentence in the report. The omission of the word *not* was probably an error of the press. It now appears from Mr. Blunt's edition, that Serjeant's Hill's MSS. agree with the report, but from another MS. note of the judgment, the sentence runs thus; Whether the remainder-man could in point of law, compel an execution of the contract, is another question, but if the power was well executed the relief would be mutual. All circumstances are observed for the remainder-man's interest, and why should he not be bound by the tenant for life?

where an attempt is made to execute the power, but there is a defect in the mode of execution.(1)

25. As where the power ought to be executed by deed, but is executed by will.(a)

26. Or the instrument is required to be attested by three witnesses, whereas it is only attested by two.(b)(2)

27. Or, according to the old law, the will ought to be under seal, but consists merely of notes in writing, which are found to be the will of the party.(c) If a testamentary instrument was required by the power to be executed and attested in a particular form, yet an instrument testamentary in execution of the power, wanting wholly the forms of signature and attestation, would have

been a good execution in equity for a favored object: [*126] there was no difference in principle between the defect in form of one witness or of two witnesses, or of three witnesses, or between the defect in form of the sealing or the signing. If the instrument was of the character required, and there was a clear intention that it should operate as an appointment, equity in favour of certain objects supplied all defects in the form of the instrument.(d) So although the subject of the power was real

(a) Tollet v. Tollet, 2 P. Wms. 489; Mose, 46, S. C.; Sneed v. Sneed, Ambl. 64; Cowp. 264, 265, cited.(1)

(b) Parker v. Parker, Gilb. Eq. Rep. 168; Cotter v. Layer, 2 P. Wms. 623; Mose. 227; Sargeson v. Sealey, 2 Atk. 412; Godwin v. Fisher, 1 Bro. C. C. 367, cited, must be the same case as Godwin v. Kilsha, Ambl. 684; Reg. Lib. A. 1768, fol. 495; Wade v. Paget, 1 Bro. C. C. 363.

(c) Smith v. Ashton, Finch. 273; 3 Keb. 551; 1 Cha. Ca. 263. 264; 1 Freem. 308. See 3 Cha. Ca. 69. 106.

(d) Hume v. Rundell, 6 Madd. 337, 338, per Sir John Leach.

(1) This case stands thus in the Register's book: Power to husband and wife, or the survivor, by any *deed* or *deeds* duly executed to charge upon the lands any sums not exceeding 3,000*l.* The husband who survived, by his *will* declared that the 3,000*l.* charged upon the estate should be disposed of for his younger children's fortunes. They had portions out of other estates. The Lord Chancellor declared that the power was defectively executed by the testator's will, but that such defect ought to be made good in a Court of Equity; and that the said 3,000*l.* was well charged by the testator's will for the benefit of the said younger children. Reg. Lib. 1747, fol. 441, Sneyd v. Trevor.

(1) 1 Story's Eq. Jur. § 173.

(2) Where a power of appointment, which was to be executed in the presence of two witnesses, by the terms of the power, was executed in presence of the one only, it was held, that equity should supply the defect in favor of a *bona fide* purchaser. Schenk v. Ellingwood, 3 Edw. Ch. 175.

estate, yet this relief was afforded as well where the defective instrument was a will, as where it was an act *inter vivos*.^(e) This was doubted,^(f) but the point was determined in the year 1752 by Lord Hardwicke, in the case of Wilkes and Holmes,^(g) where the power rode over real estate, and was expressly required to be executed by will duly executed.

28. The ground of the decisions was that as to both real and personal estate, there was merely the will of the donor, which, in the favoured cases, equity did not deem matter of substance; for even as to real estate the appointment under a power took no effect under the statute of frauds, although the rules prescribed by the statute might be arbitrarily inserted by the party. But now all wills are subjected to the same ceremonies, whether under powers or not, and the form of execution or solemnity required by the donor is no longer binding.^(h) The validity of an appointment by will, as far as regards execution and attestation, now wholly depends upon the statute law. Now equity cannot set aside or relieve against the ceremonies required by an act of parliament. The power, therefore, to assist defective executions of appointments within the statute has ceased as to wills made on or after the 1st of January, 1838. Even where the power requires, as many powers do, the precise formalities imposed by the statute, yet a defective execution cannot be supplied, for the act nullifies every appointment made by will in exercise of *any* power, unless the same be executed in manner required by the statute itself.⁽ⁱ⁾

29. It has been observed that the power of equity to aid defective executions of powers will no doubt lead to questions of great difficulty under the act, for which it was to be regretted that no provision was made. It will be difficult to extend the provisions of the act, in this respect, to any other will than one regularly made in exercise of a power,^(k) that is under a power which

(e) Wilkes v. Holmes, 9 Mod. 485; 1 Rep. temp. Redesdale, 60, n.; 1 Dick. 165; and see 2 P. Wms. 228, *arguendo*.

(f) Rob. on Stat. of Frauds, 330; and see Fra. Max. p. 5; Gilb. Lex. Prætor. 301.

(g) Wilkes v. Holmes, 9 Mod. 485; 1 Dick. 165; and see Parker v. Parker, Gilb. Rep. 168; 10 Mod. 467; see 1 Scho. & Lef. 60.

(h) 1 Vict. c. 26, s. 10.

(i) H. Sugd. Wills, 38.

(k) Sect. 1.

authorizes a will. Now this anomaly may arise under the act: If a man have a power to appoint by will, and do not *strictly* follow the form prescribed by the statute, the act will avoid the will, although in favour of his children; but if he have a power to appoint by deed, and by a will without even a witness appoint to his children, equity will aid the defect and make good the appointment. If ever the act should be held to extend to this case—which would be a great stretch—yet an appointment by a mere writing, *not being testamentary*, without any witness and without any legal form, would be supported in equity if in favour of a wife or child: whereas if the writing purport to be testamentary, the defect, however slight and informal, could not be aided if a testamentary disposition should in such a case be held to be within the provisions of the act. (l)

30. Equity will not only relieve against a defective execution of a power, but will, on the general rule, rectify a settlement itself where a mistake has been made in it, so as to render a power inoperative, or partly to defeat the intent of it, and parol evidence will be admitted to prove how the mistake arose. (m)

[128] 31. The student will not fail to have observed, that in none of the cases stated was the intention of the person *creating* the power defeated. If the power be given to be executed by deed, to him it is immaterial whether it be executed by deed or will; if three witnesses be required, to him it is unimportant whether it be executed in the presence of three or two, so *that the interest created is authorized by the power*, for equity will not relieve against the defect if the donee has been surprised into the act. But equity cannot uphold an act which would defeat the intention of the person creating the power. Thus in *Reid v. Shergold*, (1) a devisee having a life estate in a copyhold,

(l) II. Su. Wills, 25.

(m) *Rogers v. Earl*, 1 Treat. Purch. 164, stated from Reg. Lib.; and see *Prince and Green*, 3 Cha. Ca. 1, cited; *Countess of Oxford v. Lady Bruce*, 1 Frem. 308, cited; *Scambler's case*, Toth. 166; and see *Wilmer v. Kendrick*, 1 Cha. Ca. 159.

(1) By a written instrument under hand and seal attested by three or more witnesses, in the nature of an appointment of a will and testament to dispose of whenever she may please; this is a power which can only be exercised *by will*. *Williamson v. Beckman*, 8 Leigh R. 20. See also *Knight v. Yarboro*, Gilmer (Va.) Cas. 32. *Morris v. Owen*, 2 Call, R. 520. *Bentham v. Smith*, Cheves's Eq. Rep. 33.

A general power of disposition does not give an absolute ownership, if in default of

with a power of appointment by *will*, sold and surrendered the estate to a purchaser, and after her death the question was, whether the purchaser could be relieved against the defect. Lord Eldon determined that he could not. He said, "that the testator did not mean that she should so execute her power:" he intended that she should give by will, or not at all; and it was impossible to hold that the execution of an instrument or deed, which, if it availed to any purpose, must avail to the destruction of that power the testator meant to remain capable of execution to the moment of her death, could be considered in equity an attempt in or towards the execution of the power."⁽ⁿ⁾ The distinction between this case and the case of a power executed by will, though required to be executed by deed, is marked and obvious.

32. So in *Cockerell v. Cholmeley*, where the tenant for life sold the timber, and the trustees the estate, under a power of sale, which at law was held bad; upon a bill filed for equitable relief, the Master of the Rolls said: ^(o) "The plaintiffs call upon this Court to supply the defect in the execu- [*129] tion of the power, or to reform and amend the deed of the 12th of May 1783. A court of equity will, in favour of persons standing in the situation of the plaintiffs, supply a defect in the execution of a power, which consists in the want of some circumstance required in the manner of execution, as the want of a seal, or of a sufficient number of witnesses, or where it has been exercised by a deed instead of a will. But here it is at law decided that there was no power in the trustees to sell the land without the growing timber, and there is no execution by the

(n) *Reid v. Shergold*, 10 Ves. jun. 370. See *Stratford v. Lord Aldborough*, 1 Ridg. P. C. 281; *Adney v. Field*, AmbL 654; *Scott v. Davis*, 4 Myl. & Cra. 87.

(o) 1 Russ. & Myl. 424. See 12 Sim. 112.

the exercise of the power there be a limitation over. *Boyce v. Walter*, 9 Dana's (Ky.) R. 482. Where A. was trustee to convey to such persons as B. should nominate, an appointment by B. to such person as A. should in his discretion choose, gives no beneficial estate in A. until the execution of a conveyance. *Haslin v. Keen*, 2 Tayl. R. 279. *Flintham's Appeal*, 11 S. & R. 16. *Morris v. Phaler*, 1 Watts, 380. *Hess v. Hess*, 5 Id. 191. *Burwell v. Anderson*, 3 Leigh R. 349. *Frouty v. Frouty*, Bailey's Eq. R. 530. *Leibels v. Whately*, 2 Hill's S. C. Rep. 605. *Austin v. Thomas*, 14 Mass. R. 333. *McWhorten v. Agnew*, 6 Paige's R. 111. *Cameron v. Irvine*, 5 Hill's R. 276.

trustees of the power to sell the land with the growing timber ; and I find no authority which applies to this case." And this was affirmed in the House of Lords.

33. Again, where a lease by the terms of the power is made to determine upon non-payment of rent, and in consequence of non-payment it ceases at law, equity cannot set it up again. (*p*)

34. In *Hervey v. Hervey* (*q*) the power was to make a jointure of such of the lands as the donee thought proper, not exceeding 600*l.* per annum. He appointed the whole estate as a security for 300*l.* per annum. He then appointed another 300*l.* per annum clear, as a further provision ; and lastly, he appointed all the estates to raise 600*l.* per annum net, and declared that all the deeds were to secure that provision. Lord Hardwicke was of opinion, that the execution of the power was absolutely void at law and equity, for he had settled the whole estate, amounting to 900*l.* per annum, and not merely 600*l.* per annum, and he had made the jointure a clear one, contrary to the power. But he supplied the defect in equity, by securing to the wife a portion of the estate sufficient to answer a jointure of 600*l.* per annum, but to be made liable to taxes and repairs.

35. In this way the intention of the creator of the power was not contravened, and the intent of the donee of the [*130] power was executed as far as the power would admit.

We cannot fail to distinguish this case from those upon leases, where, contrary to the power, a different interest is created from what the power warrants. There are difficulties in the way of remodelling such a contract which do not present themselves in the case of a jointure, where the wife is to make no render as a tenant, but is simply to enjoy the provision authorized to be granted to her and the grant of which proves defective.

36. Lord Nottingham, in discussing the question of defective executions of powers, observed, that where it doth appear that it was intended a person should have a power, and that estates are made by him in pursuance of that power, the Court of Chancery will not be strict in all the circumstances of executing it ; and he said the resolution in *Whitlock's case*, 8 Co., might be laughed

(*p*) *Temple v. Lady Baltinglass*, Finch, 275.

(*q*) 1 Atk. 561.

at, and therefore, although *equitas sequitur legem*, generally, yet sometimes *lex sequitur equitatem*, and the Judges of late had made larger constructions of powers.

37. This observation upon Whitlock's case was probably coupled with that which followed, and not with what preceded the observation. But Whitlock's case is still *law*; and although equity, where there is sufficient consideration, may correct the limitation where it is intended only as a security, *e. g.* for portions or a jointure, or even where it is for enjoyment wholly, as in the case of a jointure, yet there is no authority that equity can correct a lease granted for lives under a power, where it ought to have been for years depending upon lives.

38. There are cases, such as Long v. Long,^(r) where equity considers the act done as only equivalent to what the power strictly authorizes. Therefore, under a power to appoint the estate amongst children, the donee may direct it to be sold, and the produce paid amongst them; for he might charge it in their favour to its value, and then it *would have [*131] to be sold to pay off the charges. But we have already considered what estates or interests may be raised under powers which equity will support, although void at law.

SECTION III.

OF RELIEF WITH REFERENCE TO THE NATURE OF THE POWER.

- | | |
|---|--|
| 1. Powers to jointure, portion, sell, revoke or appoint, aided. | 5. Not if improper covenant introduced. |
| 2. Leases by tenant in tail, and the like, cannot be aided. | 6. } Whether mere lessee at rack-rent can |
| 3. Leases of every species of property over which equity has control aided. | 7. } be relieved. |
| 4. So under the common power in settlements. | 8. Lease under a general power, defect aided. |
| | 9. Campbell v. Leach,— |
| | 10. Establishes right in a lessee, who is in the nature of a purchaser, to relief. |
| | 11. Shannon v. Bradstreet. |

1. HERE we must stop to inquire whether equity will in every case where there is a meritorious consideration, supply the defect

whatever be the *nature* of the power. It is well settled, that defects are to be supplied where the power is to jointure, to raise portions, to sell an estate, to revoke uses, or to appoint the estate itself generally; and indeed the only doubt is, how far a defective execution of a power of leasing can be aided.

2. Thus far is clear, that in the construction of powers *originally* in their nature *legal*, courts of equity must follow the law, be the consideration ever so meritorious; for instance, powers to a tenant in tail to make leases under the statute, if not executed [*132] in the requisite form, no consideration ever so meritorious will avail. So with respect to powers under the civil list act, powers under particular family entails, as the case of the Duke of Bolton, &c. equity can no more relieve from defects in them than it can from defects in a common recovery. (s) And accordingly, in an early case it is laid down, that if tenant in tail make a lease for years not warranted by the statute of 32 Hen. 8, that shall not be made good in Chancery upon a good matter of equity; (t) nor indeed has any such equity ever been administered.

3. Where the power is a common modification of property either under the statute of uses, which adopted the equitable rule and gave legal consistency to it, or still rests upon equitable aid only, as in the cases of contracts, or conveyances or limitations of the equitable estate, or operates upon property not within the scope of the statute of uses, as copyholds, or being within it, the aid of the statute is not sought in the particular disposition, as in the case of a devise directly to the objects with powers, which operate as common-law authorities, but over the dispositions of which property equity always exercised its jurisdiction, and which remains untouched by the statute,—equity still aids a defective execution: but where an enabling or restraining statute creates or puts a limit upon a power, or with a view to perpetuate an estate in a particular descent, from public policy relaxes the law of perpetuity, and gives powers to persons for ever in succession,—such cases do not fall within the jurisdiction of the Court, but wholly depend upon the law that created them.

(s) Per Lord Mansfield, Cowp. 267; and see 2 Burr. 1146, and Anon. 2 Freem. 224

(t) Boswell's case, per Hutton, 1 Ro. Abr. 379, pl. 6

4. The material question, however, to be considered, is, whether equity can relieve against a defective execution of the usual power of leasing in settlements. An opinion at one time very generally prevailed in the Profession; that, as Mr. Powell expresses it.(u) “the lessee under the power must stand [*133] or fall by that title *only*, and if that will not bear him through, as *effectually* made under a complete and perfect execution of the power, the right of the remainder-man to possess the estate free from the lease will take place of the right of the lessee, as superior to it. For in this case the lessee has no claim to any equitable interposition in his favour, but must rest his title on the legal execution of the power.” And this opinion seems, at first view, to derive some support from the case of *Temple v. Baltin-glass*,(x) where a bill filed to supply a defective execution of a power to make leases which had been held void at law, was dismissed with costs: but there appears to have been great laches on the part of the tenant, and *some of the estates leased were not authorized to be leased by the power*.

5. So in *Doe v. Sandham*,(y) a lease under a power was set aside at law, because the power required the leases to contain *usual and reasonable* covenants, and a covenant was contained in the lease which the jury found to be an *unusual and unheard-of covenant* on the part of the lessor. The lessee filed his bill in the Court of Exchequer against the remainder-man, who had recovered at law, to have the unusual covenant struck out of the lease. But the bill was dismissed.(z) It is now reported,(a) and the following judgment was given by the Lord Chief Baron, which is not a satisfactory one. “This is a bill to reform a lease and bring it within the power, the lessor being no longer alive, nor any person capable of exercising the power, and the relief is asked against the reversioner. The power is to lease for not more than twenty-one years, inserting usual covenants; the lease is made with a covenant, ‘that in case of fire the lessor shall rebuild, or the lessee may quit.’ The [*134]

(u) Pow. Powers, p. 389.

(x) Finch. 275; and see Pigot's case, Cary, p. 29.

(y) Doe v. Sandham, 1 Term Rep. 705.

(z) Sandham v. Medwin, Excheq. 2 March 1789, MS.; in the Register's Calendar it stands, Hilary Term, 1789-90,

(a) 3 Swanst. 685.

question is, whether this is a usual and reasonable covenant? An ejectment has been brought, and the lessee is evicted on the ground that this is a covenant not usual and reasonable. (b) Were the question open, it might be said, that if reasonable, though not usual, yet equity will support such a covenant; but we have no such jurisdiction, the question being precluded by the judgment at law: and there is no equity to interpose against the reversioner. One case has been decided, viz. *Campbell v. Leach*, (c) where the term was mistaken and made longer than the power. I submit to the authority, but I cannot extend the principle of the case, not agreeing to it or understanding it; though if the principle was clear, the consequences should certainly be pursued; and I understand the propriety of equitable relief in case of wives, children and creditors, in many instances. But this is not such a case; this is the case of a purchaser with notice of the power under which the lease was granted against another purchaser, viz. the reversioner; this is not like a case of forfeiture. If we are to interpose to expunge the objectionable covenant (being in truth a part of the very contract originally made), there is no instance to be put in which we ought not to reform the wrong execution of a power. Perhaps there may be a right to compel a grantor to amend his own act, but not to prevent a reversioner from taking advantage of his legal title. *Perryn, B.* said *Campbell v. Leach* was to 'relieve lessees who *had laid out great sums on the demised mines*, and the Court there proceeded on prior authorities."

6. On the other hand, in a case in 1698, the Master of the Rolls took this distinction, that where a lease is made purely voluntary, and no provision for a child, there, if the lease be not good at law, it shall never be made good in equity. *But if a lease be made to a tenant at rack-rent without a fine,* [*135] *which is voluntary, yet if the tenant hath been *at any considerable expense in building or improving,* there the Court will supply the defective execution, but otherwise not. (d)

7. From this it is clear, that the Master of the Rolls was of

(b) 1 T. R. 705.

(c) Ambl. 749.

(d) Anon. 2 Freem. 224.

opinion, that where the lessee was in *the nature of a purchaser*, he should be helped against a defective execution of a power. Now, there is no doubt that a lessee, even at rack-rent, is in a sense a purchaser. In *Hinde and Collins* it was resolved by the King's Bench, that where a man had made a conveyance with a power to revoke, and had made a lease reserving rent, *without other consideration*, that it was sufficient, and a revocation of the first estate *quoad* that lease. *(e)* That, however, depends upon a different principle. An agreement to make such a lease may of course be enforced in equity, by such a lessee, as a binding contract. In a recent case in the House of Lords, it was said that a lessee is in law and reason considered as a purchaser, *even if he takes at the best rent that the land be worth at the time*; because he forms his engagement and regulates his affairs upon the faith of his lease, and often expends his money in the improvement of the land in confidence that he shall reap the benefit of his expenditure by the enjoyment of his term. *(f)* Gilbert lays down the rule. *(g)* that if the lease under a power be for valuable consideration, as for money *bona fide* paid, or for valuable rent reserved, or as a provision for younger children, there the Court will aid a defective execution: but that a voluntary lease, if it be not pursuant to the power, cannot be sustained in equity, since there is no valuable consideration to set it up.

8. In a case *(h)* where a married woman was tenant for life, with remainder *to such uses generally* as she should appoint, and for want of appointment to herself in fee, [*136] and she granted a lease for 21 years, not attested according to the power, Lord Kenyon decided the case upon another point; but he observed, that if the question had turned upon the power of appointment, the lease not being attested conformably thereto, could not have been supported in a court of law, yet even then, being granted for a valuable consideration, and merely defective in point of form, a court of equity would have interfered, and directed a proper

(e) Cro. Jac. 131, cited.

(f) Per Abbot, C. J. in *Long v. Rankin*, App. No. 2. See *Donnell v. Church*, 4 Tr. Eq. Rep. 630.

(g) Gilb. Chan. 304, 305.

(h) *Doe v. Weller*, 7 Term Rep. 480.

lease to be granted. In *Rattle v. Popham*, he added, though Lord Hardwicke in a court of law held himself bound to decide against a lease not duly executed according to a power reserved; yet Lord Talbot, presiding in the Court of Chancery, upon a bill filed by the lessee, decreed the lease to be binding on the parties, and made the defendant pay all the costs in law and equity. But as we have already seen, the decision in *Rattle and Popham* did not involve the question we are now considering, and in *Doe v. Weller* the power was a general one. The judgment in *Sandham v. Medwin* is not favourable to the relief, and the observations in *Long v. Rankin* were not made with reference to equitable relief, but to show that a lease granted to him under a power ought to be supported if it could. The point is not concluded; but it may be thought that there is no sufficient ground, as undoubtedly there is no direct authority for aiding a defect in favour of a mere tenant at rack-rent, although holding under a lease, much less can the relief be afforded to a tenant from year to year holding under a parol or even a written contract. The part performance of the agreement by taking possession, &c. would not be material: had an actual lease been granted, a defect in it could not have been supplied. The lessee paying the full value for the estate, and that only during his occupation of it, cannot be put on the footing of a purchaser, who would sustain an actual loss if equity were not to interpose its aid. But where the lessee has expended money on the estate, he be-
 [*137] comes a *purchaser of the interest granted to him, and may well be held entitled to the aid of equity. (i)

9. In the great case of *Campbell v. Leach*, (k) the facts of which it is not easy to collect from the report, under a power to lease in possession, a new lease was granted to a person during the continuance of a former lease to him and another. The former lease was abandoned, but not surrendered: it was agreed that the new lease was bad at law, and it was doubtful whether the best rent was reserved: the bill was filed to supply the defect against the remainder-man, by the lessee, who had been at great expense. The cause was heard before Lord Bathurst, assisted by Lord Chief Baron Smythe and Lord Chief Justice de Grey.

(i) Vide *supra*, p. 93.

(k) *Ambl.* 740; *App. No. 26*, the material facts stated from *Lib. Reg.*

The Lord Chief Baron said, the question arose upon the execution of a power, where courts of equity often interfere in behalf of creditors, purchasers, wife and children: the present was the case of a purchaser: the consideration moving from him was the money he had laid out. The objection was, that it was a lease *in reversion*, as there was a subsisting lease of the premises for some years then to come; but if such former lease was in fact given up at the time of this lease, as was alleged, it would, he said, be an answer; so that if the lease was fair in its execution as to the *quantum* of the rent reserved, he thought a court of equity ought to carry it into execution. Lord Chief Justice de Grey was of the same opinion. *He said, that the power was of a mixed nature, not like a power of jointuring, or power for raising money. But this was for the benefit of the tenant for life and the remainder-man. *If executing the power was for the benefit of the remainder-man, it should receive a liberal construction; but if tenant for life invades the interest of the remainder-man in order to benefit his own only, it should have another construction.* Lord Bathurst being of the same opinion, reversed a decree at the Rolls against the lessee, *and [*138] directed an issue to try whether the rent reserved was the best that could be gotten.

10. Now it is from this case that the rule may be extracted, and it seems to be this: that where there is no fraud on the remainder-man, as where the former lease is abandoned, although not actually surrendered, or there is merely a defect in the mode of the execution of the power; for example, only one witness where two were required, or a seal be wanting, or the like; in all these cases it should seem that if the lessee *is in the nature of a purchaser*, equity will relieve against the defective execution of a power; but where the best rent is not reserved, or a fine is paid contrary to the terms of the power, or the lease substantially commences *in futuro*, or the interest of the remainder-man is, in other respects, invaded, as in the cases of *Temple v. Baltinglass*, and *Sandham v. Medwin*, before cited, there it seems clear that equity cannot relieve: (1) nor in these cases can any line be well drawn as to the *quantum* of excess, or defect in the execution of

(1) See *Stratford v. Lord Aldborough*, 1 Ridgw. P. C. 281.

the power. Therefore a lease to commence the day after the date of the deed would be equally bad with a lease to commence at fifty years from the date.(I)

11. The principle, that equity may aid a defective execution of a power to lease, derives great support from a case before Lord Chancellor Redesdale: a tenant for life, with a power of leasing, entered into a contract to grant a lease, and then died; and Lord Redesdale enforced the performance of the contract against the remainder-man. He very properly considered it as the case of a defective execution of a power, and he was of opinion that the power ought at least to be construed as liberally as a power of jointuring. He said that it was objected that a leasing power differed from all these cases of powers, and the difference is said to consist in this, that in the other cases the remainder-

[*139] man has no interest in the mode in which the power is executed; that he claims nothing under it; but that under the leasing power he claims the rent reserved. Now on what ground can it be contended that that which is a mere charge upon a remainder-man is to receive a more liberal construction than what is not a mere charge upon him, but may be much for his benefit? In the case of powers to make leases at the best rent that can be obtained, it is evident that the author of the power looks to the benefit of the estate; and that the power is given for the benefit both of the tenant for life, and of all persons claiming after him; for where the tenant for life can give no permanent interest, and his tenant is liable every day to be turned out of possession by the accident of his death, it is hard to procure substantial tenants; and therefore it is beneficial to all parties that the tenant for life should have a power to grant such leases. It is evident that the occupying tenant can afford to give a better rent under such circumstances than if he were only to have a precarious tenure. This, therefore, is a power which is calculated for the benefit of the *estate*. Other powers, generally speaking, such as jointuring powers, and powers to make provisions for younger children, are calculated for the benefit of the *family*; they may be indirectly beneficial to the remainder-man, in some respects, but they are no direct benefit to him; nor could he conceive why these powers should be construed more liberally than

(I) As to *excess* in the execution of powers of leasing, vide *supra*, ch. 9.

powers to make leases, except where it is evident that such power is abused. (*m*)

12. So in a case before Lord Kenyon, he said that a lease not being attested conformably to the power could not be supported in a court of law; yet even then, if granted for a valuable consideration, and merely defective in point of form, a court of equity would interfere, and direct a proper lease to be granted. (*n*)

*SECTION IV.

[*140]

OF EQUITABLE RELIEF WHERE THERE IS NO MERITORIOUS CONSIDERATION IN THE APPOINTEE.

- | | |
|---|---|
| 1. Fraud, relieved against. | 6. But fraud must be proved. |
| 2. Stranger may be relieved where person interested withholds the deed. | 7. Surprise, a ground for relief. |
| 3. Or a wife is prevented by her husband. | 8. } Accident or disability, qu. |
| 5. Or the remainder-man lie by and permit expenditure. | 9. } |
| | 10. Disability to sign, from the gout, not aided. |

1. WE have hitherto confined ourselves to the consideration of the cases where there is a meritorious consideration in the appointee, but in some instances equity will relieve the appointee against the defective execution, although he is a mere stranger. This is generally on the ground of fraud.

2. Thus, where the person interested in the non-execution of the power has the deed creating the power in his custody, and the donee of the power wishing to execute it sends for the deed, which the party refuses to deliver, and thereupon the donee does an act with an intent to execute the power, equity will uphold the execution, although defective, by reason of the fraud in the person who was to have the benefit of the original settlement. (*o*)

3. So equity would extend the same relief to a case where a

(*m*) Shannon v. Bradstreet, 1 Sch. & Lef. 52.

(*n*) Doe v. Weller, 7 Term Rep. 478; and see Willes, 176, 13 Ves. jun. 576.

(*o*) See 3 Cha. Ca. 67. 83, 84. 89. 93. 108. 122; Ward v. Booth, 3 Cha. 69, cited; and see Fort. 333.

wife having a power of revocation over an estate vested in her husband is desirous to exercise it, but the husband hinders any body from coming to her, or prevents the execution, or obstructs the engrossing of the deed of revocation.(p)

[*141] 4. In a case before Lord Eldon he refused an injunction against the husband of a woman having a power of appointment to prevent reasonable access to her for the purpose of obtaining her execution of a deed to the effect of a will she had already executed, and which it was apprehended her husband would compel her to revoke. Lord Eldon relied upon the deed not having been drawn by her instructions; but he doubted whether he should interfere if that were certain. *There had been many cases where persons had been prevented from executing an instrument, and the Court had considered and treated it as if it had been executed*; but here, suppose the lady should die without executing the deed, would it be possible, he asked, for the Court to consider it done, when it did not appear that she gave instructions for it?(q)

5. On the ground of fraud also it has been decided, that although a power be defectively executed, and the Court cannot relieve the appointee, yet if the remainder-man, with notice of the defect, has lain by a considerable time, and suffered the appointee to expend money on the estate, and acquiesced in his title, equity will compel him to make good the defect.(r)

6. But fraud being a thing odious, and never to be intended or presumed, must be strictly proved.(s) Therefore in a case where a wife having a power of revocation over an estate vested in her husband, sent instructions to a solicitor to prepare a deed of revocation, and the solicitor, who was a friend of the [*142] husband's, communicated the instructions to him, al-

(p) *Piggot v. Penrice*, Com. 250; *Prec. Cha.* 471; *Vane v. Fletcher*, 1 P. Wms. 354; *Luttrell v. Olmuis*, 11 Ves. jun. 638, cited; and *Segrave v. Kirwan*, 1 Beat. 157; *Bulkley v. Wilford*, 2 Cla. & Finn. 102.

(q) *Middleton v. Middleton*, 1 Jac. & Walk. 94. But the evidence was clear that she stated that the deed was the result of her instructions; that it was done by her desire, and she wished to sign it, and should not die happy if she did not sign it. Lord Eldon was afraid of exercising such a jurisdiction.

(r) *Stiles v. Cowper*, 3 Atk. 692; *Shannon v. Bradstreet*, 1 Rep. temp. Redesdale, 52; and see *Anon. Bunb.* 53; *Stratford v. Lord Aldborough*, 1 Ridgw. P. C. 281.

(s) 3 Cha. Ca. 85. 114.

though he was desired to keep them secret, and delayed perfecting the deed so long that the wife died before it was executed, the Court censured the solicitor for his conduct, but denied relief to the intended appointee, because no fraud was proved in the husband himself.(t)

7. Under this head of fraud we may rank surprise; for to enable equity to relieve, the surprise must be such as is attended and accompanied with fraud and circumvention.(u)

8. So it is said that a court of equity may relieve in the cases of accident or disability. Thus, in the Earl of Bath's case,(x) where to the execution of the power six witnesses were required, and three of them were to be peers, the Duke of Albemarle, the donee of the power, afterwards went over to Jamaica, and it was said by Mr. Baron Powell, that in case the Duke had taken the deed over with him to Jamaica, and there had had an intention to revoke it, and had gone as far as he could to do it, had made his will, and had six witnesses to it, he believed it would be a good revocation in equity, though none of the witnesses were peers, because of the *disability* he would be under to have such witnesses.(y) Lord Chief Justice Treby, and the Lord Keeper, appear to have entertained the same sentiments;(z) and in a modern case Lord Mansfield expressed himself of the same opinion.(a) Lord Chief Justice Treby, in the Earl of Bath's case, said that the accident or impossibility of complying with the circumstances was another ground of relief in equity, when the donee hath a plain intention to do it; but then he must do all that he can, as the case of a man's being obliged to pay or tender money at such a place, and he fall sick, or lame, or bed-ridden, that he cannot go thither, and it is tendered by another by his order, or at another place, this being an act of God, he [*143] thought it would be a good performance of the condition.(b) And Lord Chief Justice Holt considered *accident* a

(t) *Piggot v. Penrice*, Com. 250; Prec. Cha. 471.

(u) 3 Cha. Ca. 114, 115.

(x) Ibid. 68.

(y) Ibid.

(z) Ibid. 90. 126.

(a) Cowp. 267; and see *Piggot v. Penrice*, Com. 256.

(b) 3 Cha. Ca. 89.

good ground of relief.(c) as where the party was prevented by sickness.

9. Upon none of these points has there been any decision ; and perhaps many of the *dicta* did not mean to put the case higher than a defective appointment ; although excusing the defect on account of the accident or disability, as in the case of *Parker v. Parker*, where a man having power to charge lands for younger children, by a writing under his hand, attested by three witnesses, did, in fear of sudden death, and being absent from home, by a paper, attested by two witnesses, charge his estate for his children, and this defect was supplied, *because occasioned by his being absent from home, and so not being able to have a sight of the deed where this power was contained.*(d). And yet it would have been equally aided had he been in perfect health, quietly at home in his study, with the deed open before him.

10. There is a case in which a deed executed under a power was held to be badly executed for want of a signature (which was required*by the power,) *although the donee could not write by reason of the gout in his hand.*(e) And notwithstanding the authority of the great personages by whom the foregoing *dicta* were pronounced, it may be doubted whether equity ought to relieve on the mere ground of accident or disability. How can it be ascertained that in the cases supposed the parties had not the sickness of the donee of the power, or his absence abroad, in their contemplation ? These are circumstances of ordinary occurrence : from sickness few are exempt ; and it might have been intended, that during the party's absence from his friends, or whilst his mind was enfeebled by illness, the power should not be executed.

(c) *Ibid.* 108, 109.

(d) 10 Mod. 467.

(e) See *Blockville v. Ascott*, 2 Eq. Ca. Abr. 659, n.(b).

*SECTION V.

[*144]

OF ELECTION AND SATISFACTION.

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| 1. Election: forfeiture and compensation. | 15. Although there is a declaration that election shall be raised. |
| 2. Confined to equity. | 16. Robinson v. Harcastle. |
| 3. Applies to all persons and all interests. | 17. No election when by construction parties entitled to take absolutely. |
| 4. Copyholds, freeholds: deeds, wills. | 19. No election against legatee as to real estate, if devisor an infant. |
| 5. Conditions not a case of election. | 20. Or will not duly attested. |
| 6. Election against heir although he take by descent. | 21. Unless in the case of an express condition. |
| 8. Election by parent will not bind his children. | 22. <i>Thelluson v. Woodford</i> : after-purchased estates: 1 Vict. c. 26. |
| 9. Election although donor supposed he had power. | 23. No election until funds cleared. |
| 10. Election raised upon appointment to a party not entitled. | 24. Party bound by acquiescence. |
| 11. Or an appointment to one of two parties entitled. | 26. Court elects for infants and married women. |
| 12. Or where the donee delegates his power. | 27. Consequences of election. |
| 13. But not, if no other fund. | 29. Satisfaction. |
| 14. Intention must appear on the instrument. | |

1. THE doctrine of election furnishes another principle in favour of the defective execution of a power, although there is no meritorious consideration in the appointee. The foundation of election is that no one shall claim under and in opposition to the same instrument. When a man claims under a deed, he must claim under the whole deed together; he cannot take one clause, and desire the Court to shut their eyes against the rest. There is a tacit condition annexed to all provisions of this nature, that the person taking do not disturb the disposition which his benefactor has made; (*f*) and therefore the true [*145] rule, following up the principle, should be forfeiture to the disappointed devisee, and not merely compensation. In many cases compensation could not be made, as in the instance of a field belonging to the adverse claimant given to a devisee, because it is in front of his house; could compensation in that case be made with reference to the power in the owner of the land to render the house not fit for habitation? If compensation be the rule, there are but few cases in which the testator's intention will be effected. If the value of the property given to the party who is

put to his election be less than the value of his property given to a third person, or only equal to it, the party would in ordinary cases elect to take against the will. If the property even be greater, the party having a right to elect would of course, in every case where he was desirous to retain his own property, or to disappoint the intention of the testator, or the hopes of his devisee, elect to take against the will, and pay a compensation to the disappointed devisee out of the testator's own property, which he (the party electing) takes under the will. This clearly is not effectuating the testator's intention, for he did not intend that the disappointed devisee should have the value of the subject of the gift paid to him; his meaning was to vest in the party the property devised to him; and to secure the acquiescence of the person really entitled to such property, he makes another provision for him. If forfeiture in favour of the disappointed devisee be the rule, the testator's intention will in most cases be fulfilled; and if the intention be not effectuated, at least the testator will not have made a provision contrary to his intention for a party who elects to his will; and the disappointed devisee will take that provision which the testator thought would be a sufficient inducement to the party electing to acquiesce in the dispositions made by the will.(g)

[*146] *2. The doctrine is confined to courts of equity,(h) although it was once treated as a fit subject for legal jurisdiction.(i)

3. It applies even to interests of persons under disabilities, as infants and married women; nor is it material whether the interests are immediate, remote, contingent, of value, or not of value.(k)

4. And the rule applies as well to copyhold as to freehold estates,(l) and to deeds as well as to wills.(m)

(g) But see n. to 1 Swanst. 433; Tibbits v. Tibbits, 19 Ves. 656; Jac. 317.

(h) Robinson v. Hardeastle, 2 Bro. C. C. 22.

(i) First point in Doe v. Lord Geo. Cavendish, 4 Term Rep. 743, n; but, as Lord Mansfield said, the ground struck him in considering the case, which the parties had not thought of, or adapted the case to.

(k) 2 Ves. jun. 539, 696, 697; 3 Ves. jun. 385; Ardesoife v. Bennet, 2 Dick. 463.

(l) Rumbold v. Rumbold, Wilson v. Mount, 3 Ves. jun. 65. 191; Petteward v. Prescott, 7 Ves. jun. 541.

(m) Moore v. Butler, 2 Scho. & Lef. 249; Green v. Green, 2 Mer. 86; Dillon v. Parker, 1 Swanst. 359; Jac. 505.

5. But we must be careful to distinguish cases of express conditions, which clearly are not cases of election.

6. It is well established, that an heir shall be put to his election where the estate is devised to him, although by the rule of law the devise is inoperative, and he takes by descent; as, if a man being seised of some lands in tail, and also of others in fee, devise the intailed lands to his youngest son, and the fee-simple estate to his eldest, who is issue in tail; the devise to the eldest is void, and he takes by descent, yet nevertheless he shall be put to his election.⁽ⁿ⁾(1) So where he and other co-devisees elect to take against the will, the whole goes to the disappointed devisees.^(o) In the discussion of *Thellusson v. Woodford*, Sir Samuel Romilly put it as a doubtful point, whether the heir must elect where a legacy is given to him, and an estate to a stranger, and after the will a recovery is suffered by [*147] the testator, whereby the will is revoked, and the estate descends to the heir, and he thought that the heir could not be put to his election; but Alexander, who was on the other side, thought it was a case of election, as was, he said, every case in which you can look at the will. The point, however, seems very doubtful, for notwithstanding that the testator intended the estate to go to the devisee, yet *the will being revoked as to the devise*, although by construction of law, there seems to be no equity attaching on the conscience of the heir. Independently of the question of election, equity could not relieve the devisee against the revocation of the will.

7. Even where a devisee, by the effect of an election by another devisee to take against the will, himself takes an interest not intended for him by the testator, but which in part makes good the provision for him, he may still insist, against the party electing, to a satisfaction for the disappointment, *pro tanto*, of the devise contained in the will.^(p)

8. Where interests are given to a person, and to his children

(n) *Noys v. Mordaunt*, 2 Vern. 581; *Anon. Gilb. Eq. Rep.* 15; *Welby v. Welby*, 2 Ves. & Bea. 187. See *Rich v. Cockell*, 9 Ves. jun. 369; and see *White v. White*, 2 Dick. 522; *Reg. Lib. B.* 1775, fol. 650—655.

(o) *Gretton v. Haward*, 1 Swanst. 409.

(p) *Ibid.*

(1) But now by the 3 & 4 Will. 4, c. 106, s. 3, the heir would take as devisee.

after him, the claim of the parent in opposition to the will will not bind the children, who may elect for themselves. *(q)* In one case it seems to have been thought that an election could not be raised upon an estate settled with several limitations, on account of the confusion which would ensue: the devise would sometimes be good, at other times not, as the devisee in remainder submitted to the will or not; *(r)* but this objection is not now attended to.

9. At one period it was holden, that where a person supposes he has lawful power to dispose of an interest, and this appears on the face of the will, it is not a case of election, as it could not be proved that he meant to dispose of the estate if he had known he had no power to dispose of it. *(s)* This construction [*148] has, however, been very properly overruled, *(t)* upon the ground of the danger of speculating upon what the testator would have done had he known the fact; but where he expressly makes the appointment, in case he has power to do so, no case of election arises. *(u)*

10 It follows, from these principles, that where a man having a power to appoint to A. a fund, which in default of appointment, is given to B., exercises the power in favour of C. and gives other benefits to B., although the execution is merely void, *(1)* yet if B. will accept the gifts to him, he must convey the estate to C. according to the appointment. *(x)*

11. So where a power is to appoint to two, and he appoints to one only, and gives a legacy to the other, that is a case of election. *(y)*

(q) *Ward v. Baugh*, 4 Ves. jun. 623. See *Long v. Long*, 5 Ves. jun. 445.

(r) *Forrester v. Cotton*, Ambl. 388.

(s) *Cull v. Showell*, Ambl. 727; *Wood. App.*

(t) *Whistler v. Webster*, 2 Ves. jun. 367; and see *Wright v. Rutter*, 2 Ves. jun. 673; *Rutter v. M'Lean*, 4 Ves. jun. 531; and see *Doe v. Lord George Cavendish*, 4 Term Rep. 741, note.

(u) *Church v. Kemble*, 5 Sim. 525.

(x) *Whistler v. Webster*, 2 Ves. jun. 367.

(y) *Wollen v. Tanner*, 5 Ves. jun. 218. See *Vane v. Lord Dungannon*, 2 Scho. & Lef. 118. See *Beere v. Prendergast*, 1 Hay. & Jon. 384; and *qu.* whether all the children were not bound to elect.

(I) This perhaps cannot properly be called a defective execution of the power, because C. was not the object of the power, but it affects the remainder so as to put the party entitled to it to his election

12. Again, where a father authorized his wife to execute a power vested in himself, and gave the objects of the power other benefits, although the father could not delegate the power, yet it was held that any one who would defeat what the mother had done, by what was in truth no power, should have no benefit under the father's will.(z)

13. But where there is no other fund than that appointed, the doctrine of election, which depends upon compensation, cannot apply: as where, under a power to appoint to children, the father appoints it improperly, any child entitled in default of appointment may set it aside, although a [*149] specific part is appointed to him, for the doctrine of election can never be applied but where, if an election is made contrary to the instrument, the interest that would pass by it can be laid hold of to compensate for what is taken away; therefore in all cases there must be some free disposable property given to the person, which can be made a compensation for what the testator takes away.(a)

14. To raise a question of election, a clear intention to pass the particular estate must appear,(b) and it must appear upon the face of the instrument; it cannot be compelled on any thing *dehors*.(c) But still extrinsic evidence has been allowed to show what the testator considered as *his* estate, and consequently to determine what passed under a general devise so as to put a party to his election.(d)(1)

(z) See 1 Ves. 259, *Ingram v. Ingram*, cited; not reported as to this point, 2 Atk. 88.

(a) *Bristow v. Warde*, 2 Ves. jun. 336.

(b) *Dashwood v. Peyton*, 18 Ves. 27. See 1 Bro. C. C. 492.

(c) *Stratton v. Best*, 1 Ves. jun. 285; *Finch v. Finch*, ib. 535. See *Judd v. Pratt*, 13 Ves. jun. 168; *Dummer v. Pitcher*, 2 Myl. & Kee. 262; *Cooke v. Briscoe*, 1 Dru. & Walsh, 596.

(d) See *Pulteney v. Darlington*, 1 Bro. C. C. 223; *Pole v. Lord Somers*, *Druce v. Denison*, 6 Ves. jun. 309, 385; and see *Wright v. Rutter*, 2 Ves. jun. 673; *Rutter v. M'Lean*, 4 Ves. jun. 531; *Monck v. Lord Monck*, 1 Ball & Beatty, 298; but see *Forrester v. Cotton*, Ambl. 389.

(1) "See *Webley v. Langstaffe*, 2 Desauss. Ch. R. 504, and upon the doctrine of election the note to that case at page 513."—Note to 1st Am. Ed.

"There is no material difference of principle in the rules of interpretation, *between wills and contracts*, except what naturally arises from the different circumstances of

15. And even where the patry doing the act declares that every person taking under his will shall be bound by the doctrine of election to give effect to every disposition contained in it, yet the question must first be decided whether the estate belonging to any devisee was intended to be disposed of by the will.(e)

16. In *Robinson v. Hardcastle*(f) the power was to the father to appoint to such of his children as he thought proper, and in default of appointment, the estate was limited to the sons successively in tail, with remainder, subject to portions for daughters, to the father in tail, remainder to the father in fee. [150] The father by his will charged the estate *with life annuities to two of his four daughters, and, so charged, devised it to his only son for life, with remainder to his issue in strict settlement, with remainder as to separate portions of the estate to his two other daughters in fee, and gave his personal estate to his son. It was held that the appointments to the grandchildren and the remainders over to the two daughters were void. The son, as tenant in tail under the settlement, suffered a recovery and devised away the estate. Upon inquiry, it appeared that the personal property taken under the will was trifling. Lord Thurlow, upon the question of election, said, if the amount made it worth arguing, he was against them on this point; he did not think this case was within the rule. The reason was, that he

(e) See *Trollope v. Linton*, 1 Sim. & Stu. 477.

(f) 2 Bro. C. C. 22. 344.

the parties. The object in both cases is the same, namely, to discover the intention. And to do this the Court may, in either case, *put themselves in the place of the party*, and then see how the terms of the instrument affect the property or subject-matter. With this view evidence must be admissible of all the circumstances surrounding the author of the instrument." 1 Greenl. on Ev. §§ 287, 288, 289. See also 1 Phill. on Ev., 554; 3 Phill. on Ev., Cowen & Hill's Notes 1362, and cases there cited. 2 Phill. on Ev. 277, 9th Ed. *Smith v. Bell*, 6 Peters's Rep. 75. *Wooster v. Butler*, 13 Conn. R. 217. *Bell v. Marten*, 3 Harr. N. J. Rep. 167. *Brackenridge v. Duncan*, 2 A. K. Marsh. Rep. 51. *Patterson v. Leith*, 2 Hill's S. C. Ch. Rep. 16. *Comfort v. Mather*, 2 W. & S. Rep. 480. *Lewis v. Lewis*, 2 W. & S. Rep. 450. *Kimball v. Morrell*, 4 Greenl. Rep. 368. *Reeves v. Reeves*, 1 Dev. Eq. Rep. 386. *Hayden v. Ewing*, 1 B. Monroe's R. 113. 1 Jarman on Wills, ch. 12, p. 349, Perkins's note. Wigram on Wills, 11—14.

As to the doctrine of election see 2 Story's Eq. Jur. §§ 889, 1078, 1079, 1080, 1100, and notes, 4th Ed., Boston, 1846, and note (a) p. 154, *post*.

took this to be an appointment that was [not] disappointed. It was a good appointment with respect to the annuities, and being an appointment to one person, he could not construe it a disappointed devise as to another. It was not the case where one person devising to A. and B., and B. defeating the devise to A. is obliged to make satisfaction.

If this opinion can be maintained, it will follow that where a person exercising a power creates some interests warranted by the power and others not, although he makes other provisions for the person who takes in default of appointment, yet it is not a case of election, because the whole disposition of the settled estate is not inoperative. But this can hardly be supported. The testator intended the *whole of his disposition* to take effect, and not simply the life annuities to two of the daughters; and his son, the legatee of his own property, had the means of giving *full effect* to every part of his father's disposition. The son took at once under and in opposition to his father's will, which contradicts the rule.

17. Where an appointment is made to the objects of the power, for example, to children, absolutely, with a superadded direction, *as far as the donee can lawfully or equitably*, that the **shares shall be for the children for life, and after their* [*151] *deaths for their children, the trusts for the grand-children are void, but no case of election is raised.*(g)

18. In all the foregoing cases where a case of election was established, we cannot fail to have observed, that the interest did not pass by the instrument; but still some nice distinctions have been taken as to the legal capacity of the devisor, and the validity of the instrument to pass the interest in case he had actually been entitled to it in his own right.(1)

(g) Carver v. Bowles, 2 Russ. & Myl. 301.

(1) An interest in the thing to be produced by the power as the proceeds of a sale under it, is not a power coupled with an interest. The estate on which the power acts must be in the donee, so that he acts in his own name; if the estate has never passed to him, he must act in the name of the party, giving the power in whom the estate is vested; and to be valid, it must be such an act as would be valid if executed by the donor; it is therefore revocable by death. *Hunt v. Rousmanier*, 7 Wheat. 204. Thus a power given to a mortgagee is coupled with an interest and not revocable by the death of the mortgagor. *Bergen v. Bennett*, 1 Caines Ca. Er. 1. For a naked power is when to a mere stranger authority is given to dispose of an interest in which she

19. This doctrine was first discussed in a case of frequent reference. (h) There an infant having personal estate, of which

(h) *Hearle v. Greenbank*, 3 Atk. 695; 1 Ves. 298.

had not before, nor hath by the instrument creating the power, any estate whatever: but when the power is given to a person who derives under the instrument creating the power, or otherwise, a present or future interest in the land, it is then a power relating to the land and may be either appurtenant or in gross. Per Kent, J. 14. 15. And this appurtenant and not in gross, for by the exercise of the power a right to the equitable estate of the mortgagor is acquired during the existence of the legal estate of the mortgagee, who is the donee. *Wilson v. Troup*, 2 Cow. 236. Which strangely contrasts with the doctrine of the same court, that a mortgage is a lien and not an estate. A beneficial interest is, however, not required to create a power coupled with an interest—the estate of an executor, guardian, or trustee, is sufficient for that purpose. *Bergen v. Bennett*, ut sup. 16.

A doctrine was advanced in *Jackson v. Burtis*, 14 Johns. 391, which apparently conflicts with the rules above stated. It was there held that where two out of eleven devisees in their own right, were appointed executors with power to sell, their estate as devisees united in some way with the power and gave such an interest as would cause the power to survive. It is believed this is the only case ruling the point. There was some reference and perhaps reliance on it, in *Osgood v. Franklin*, 2 J. C. R. 20, but the case there and in 14 Johns. 391, were ruled on a distinct ground of a trust. In *Jackson v. Given*, 16 Johns. 171, the same learned Judge seems doubtful of the position, for he advances it only as the inclination of his mind. It seems scarcely possible to sustain the decision on that ground. If the power was given *ratione officii* it of course survived, and that it was so given seems to be the more probable construction of modern times. *Craig v. Craig*, 7 Dana, 9; *Heron v. Hoffner*, 3 Raw 396. Though the contrary was held in *Conklin v. Egerton*, 21 Wend. 430. Hence the question of interest in that view was immaterial. But suppose it to be material, could the interest or estate under the will unite with the power given *ratione officii*? It may be questioned whether the devisees were not in by descent, as the devise was to all children equally, and hence the will was so far inoperative, and the power in such case was held to be a naked one in *Jackson v. Schaubert*, 7 Cow. 187. But it seems clear that where two rights vest in one person in different capacities, they are to be considered as if vesting in two persons. 4 Whart. 27; 7 Watts, 386; 1 Watts, 370; 2 Raw. 420; 6. Mad. 235. That a power and estate may be thus divided seems not to be attended with greater difficulties than where a partial estate only is vested in the donee. The power moreover would be liable to be destroyed by the act of the party. Conceding however the unity of the interest and the power, the decision cannot possibly stand on this ground. If it united with the estate, it was with that estate which was vested in the executors personally; this was a fee in two eleventh parts, and the estate conveyed was the entirety. Upon nine elevenths then as there was no estate in them, the conveyance of the executors operated under the power alone, to render which valid in that case required it should survive, and consequently be vested in them *ratione officii*. This case might therefore be cited as an authority to show that a power to any executors hereinafter named was vested *ratione officii*. In *Bloomer v. Hill* the authority of this doctrine is questioned, but no case has been

she had ability to dispose, and a power over a real estate, to which she was entitled in default of appointment, bequeathed the personalty to her only child, and appointed the estate to strangers. And Lord Hardwicke held the appointment to be void, and that this was not a case of election, because the will was void as to the real estate, on account, as he observed in another case, ⁽ⁱ⁾ of her infancy; and he added, as it would if she had been a feme sole. *This was a disability in the person.*

20. Lord Hardwicke said, it was like the case where a man executed a will in the presence of two witnesses only, and devises his real estate from his heir-at-law, and the personal estate to the heir-at-law; this is a good will as to personal estate; yet for want of being executed according to the Statute of Frauds, is bad as to the real estate; and he said he should in that case be of opinion, that the devisee of the real estate could not compel the heir-at-law to make good the devise of the real estate before he could entitle himself to his personal legacy, because here was no will of real estate for want of proper forms and ceremonies required by the statute. This doctrine has been recognized and acted upon ^(j) by Lord Alvanley, ^(k) Lord Kenyon, ^(l) and Lord [*152] Eldon; ^(m) for although the will cannot be read without

⁽ⁱ⁾ 2 Ves. 14. See 1 Vict. c. 26, s. 7.

^(k) Ex-parte the Earl of Ilchester, 7 Ves. jun. 372.

^(l) Carey v. Askew, 8 Ves. jun. 492, cited by Romilly; and in the argument of Thellusson & Woodford, *infra*, MS. See Dundas v. Dundas, 1 Dow & Clark, 349.

^(m) Shedden v. Goodrich, 8 Ves. jun. 481; Ker v. Wauchope, 1 Bligh, 1; Gardner v. Fell, 1 Jac. & Walk. 22.

met with directly overruling it. Jackson v. Schaubert, 7 Cow. 187, is the nearest. There was a power and direction to the executors to sell and pay certain legacies, the residue to one of them. The case does not state whether there was any devise of the land; if there was not, however, it must have vested in the executors, who were heirs with others. The Court held this was but a naked power not breaking the descent, which a power coupled with an interest does. Burr v. Sim, 1 Whart. 266. Unless, therefore, there be a distinction as to the effect of giving a power by an ancestor to his executor, being one of his heirs in by descent and to one in by devise, it seems that the rule of Jackson v. Burtis is overturned by that in Jackson v. Schaubert.

Allison v. Kurtz, 2 Watts R. 186, is similar to Jackson v. Burtis, except the power was rather in the nature of a trust, there being a direction to sell, and there it was held that the deed could only operate under the power, there being no interest in the and but in the proceeds. McMurtrie's note to 2 Crabb on Real Property, on p. 681, Johnson's Law Library, No. 165.

the devise in it, yet as Lord Alvanley correctly expressed it, a Judge can say, for the Statute of Frauds enables him, and he is bound to say, that if a man by a will unattested gives both real and personal estate, he never meant to give the real at all. (n)

Lord Hardwicke, however, determined that where an express condition is annexed to the personal legacy, the heir-at-law must make good the devise of the realty, or give up his legacy : (o) and although this distinction has been constantly disapproved of, yet it has always been acted upon and cannot now be dis-

turbed. (p) (I)

{ 153 } 22. A point lately arose in the great cause of Thellusson and Woodford, (q) which again called this doctrine into question. Thellusson, by his will duly executed to pass real estates, gave legacies to his heir-at-law, and directed that all contracts for the purchase of estates which he should enter into before his death, should be completed by his trustees, who should stand seised thereof to the uses mentioned in his will. He did purchase estates, and did not re-publish his will. Some were actually conveyed to him, the contracts for others remained *in fieri*. The question was, whether the heir should be put to his election. The case was elaborately argued. The principal argument for

(n) *Buckeridge v. Ingram*, 2 Ves. jun. 666; see now 1 Vict. c. 26.

(o) *Boughton v. Boughton*, 2 Ves, 12.

(p) *Carey v. Askew*, *Sheldon v. Goodrich*, *ubi sup.*; and *Thellusson v. Woodford*, *infra*.

(q) See 4 Ves. jun. 295. 297.

(I) In Thellusson's case, Lord Erskine said the general case of election is good. As to the exceptions, an infant may bequeath his personalty, but not so as to his realty. An infant having real and personal property, and having both capacity and power to bequeath the personalty, gives the personalty under the idea that he can dispose of his realty; now I conceive, with submission, that the infant's will may be read. If I had originally had to decide this point, I would have held it a case of election; so of a feme covert, I want to know why the husband should not be put to his election; I cannot see the common sense of that exception, but I am bound by authorities; so where a will is executed in the presence of two witnesses, why should it be read so as to give the heir the personalty? I would never have given him the legacy. How pure the laws of England would be were it not for these subtleties! But I dare not decide this case against the authority of Lord Hardwicke: MS. In *Carey v. Askew*, as stated by Sir Samuel Romilly, Lord Kenyon said, he should have found it difficult to distinguish the cases; but he felt himself bound by Lord Hardwicke's decision, although he thought *Boughton v. Boughton* wrong. It was settled that the heir could not be put to his election without an express condition, and you cannot presume a condition. Express conditions were not like this case. MS.

the heir-at-law was, that there was no case in which the heir-at-law was put to his election as to estates which came to him as heir. This was strongly urged, and the case was distinguished from cases of express conditions; and it was neatly argued, that there were three requisites to a devise: 1st, age; 2d, possession; and 3d, three witnesses; and that any will in which any of these was wanting was void, and not a case of election. Well, here the second was wanting, and the question of election could not arise any more than if the deviser had been an infant. On the other side, it was insisted, that there being no disability in the person of the deviser, this was a case of election. Suppose a legacy to be given to a stranger, and a legacy to the heir, and a devise of the stranger's estate to a third person: that, it was said, was a case of election. Then suppose the testator to purchase the estate: how, it was asked, could that be said not to be a case of election? It was determined that the heir should be put to his election.(*r*) and the decree was affirmed in the House of Lords.(*s*) The statute of 1 Vict. c. 26, s. 24, has now rendered the aid of equity unnecessary *in [*154] such a case, as all after-purchased estates will now pass by a prior will, unless a contrary intention appear by the will.

23. A person is never put to his election till the funds are clearly ascertained, so that he may know exactly what he is to receive as a compensation for that which he gives up:(*t*) and the party may file a bill to have the state of the fund ascertained.(*u*)(1)

24. Where the state of the fund is free, and the party has

(*r*) *The Blusson v. Woodford*, Aug. 1803, MS.; 12 Ves. jun. 203.

(*s*) *Rendlesham v. Woodford*, 1 Pow. 279. See *Back v. Kett*, Jac. 534; *Johnson v. Telford*, 1 Russ. & Myl. 244; *Churchman v. Ireland*, 1 Russ. & Myl. 250.

(*t*) *Wake v. Wake*, 1 Ves. jun. 335; and see 2 Ves. jun. 370.

(*u*) *Butricke v. Broadhurst*, 1 Ves. jun. 171; 3 Bro. C. C. 88.

(1) See *Kenney v. Beverley*, 2 Hen. & Munf. 340, per Tucker, J., citing a number of authorities. *Van Orden v. Van Orden*, 10 Johns. R. 30. *O'Driscoll v. Koger*, 2 Desauss. Ch. Rep. 255; and see and consider *Snelgrave v. Snelgrave*, 4 Desauss. Ch. Rep. 274, and *Gest et al. v. Cattell's Heirs*, 2 Desauss. Ch. Rep. 53. [Note to 1st Am. Ed.] "Election in the sense in which Equity employs it, is the obligation imposed upon a party to choose between two inconsistent or alternative rights or

acquiesced a long time, he will be held to have elected, although he has not expressly done so : (r) but where the fund is embarrassed, a long acquiescence has been held not to bind the claimant, (x) and *a fortiori*, the mere receipt of gifts under the will for a short period will not have that effect : (y) and where a widow released her dower, and elected to take under her husband's will, and the provision for her was afterwards claimed by creditors, she was allowed to resort to her dower, notwithstanding her election. (z) (1)

(r) *Butricke v. Broadhurst*, *ubi sup.*; *Ardesoife v. Bennet*, 2 Dick. 463.

(x) *Beaulieu v. Lord Cardigan*, Amb. 533; 6 Bro. P. C. 232. See 1 Ves. jun. 172 336; *Yate v. Mosely*, 5 Ves. jun. 483, 484.

(y) *Wake v. Wake*, 1 Ves. jun. 335; *Rumbold v. Rumbold*, 3 Ves. jun. 65. See *Stratford v. Powell*, 1 Ball & Beatty, 1.

(z) *Kidney v. Cousmaker*, 12 Ves. jun. 136.

claims, in cases, where there is clear intention of the person, from whom he derives one, that he should not enjoy both. Every case of election pre-supposes a plurality of gifts or rights with an intention, express or implied, of the party, who has a right to control one or both, that one should be a substitute for the other. The party who is to take has a choice, but he cannot enjoy the benefits of both.' 2 Story's Eq. Jur. § 1075, § 1083. See the following American authorities, *Fuller v. Yeates*, 8 Paige's N. Y. Ch. Rep. 325. *Jackson v. Churchill*, 7 Cowen's R. 287. *Pickett v. Peay*, 2 S. C. Const. Rep. 746. *Kennedy v. Mills*, 13 Wend. R. 553. *Bailey v. Duncan*, 4 Monroe, R. 265. *Bull v. Church*, 5 Hill's N. Y. Rep. 206. *Shaw v. Shaw*, 2 Dana, R. 342. *Duncan v. Duncan*, 2 Yeates, R. 302. *Shotwell v. Dedham*, 3 Ohio R. 1. *Alsit v. Adsit*, 2 Johns. Ch. R. 418. *Gorden v. Steres*, 2 Hill's Ch. (S. C.) Rep. 48. *Herbert v. Wren*, 7 Cranch, S. C. Rep. 370. *Hall v. Hall*, 2 McCord, Ch. (S. C.) R. 289. *Smith v. Kniskern*, 4 Johns. Ch. R. 96. *Jones v. Powell*, 6 Ib. 194. *Kennedy v. Nedrew, et ux* 1 Dall. R. 414, per McKean, Ch. J. p. 418. *Evans v. Webb*, 1 Yeates, R. 424. *Webb v. Evans*, 1 Binn. R. 566. *Hamilton v. Buckwalter*, 2 Yeates, R. 389. *McCullough v. Allen*, 3 Yeates, R. 19. *Crearcraft v. Wions*, Addison's (Penn.) R. 350. *Semple v. Semple*, 2 Yeates, R. 433. *Crearcraft v. Dille*, 3 Id. 79. *Wilson v. Hamilton*, 9 S. & R. R. 424. *Kline v. Grayson*, 4 Binn. R. 225. *Reigan's Estate*, 7 Watts's R. 438. *Adlum v. Yard*, 1 Rawle, R. 171. *City of Philadelphia v. Davis*, 1 Whart. R. 499. *Allen v. Getz*, 2 Penn. R. 219. *Caulfman v. Caulfman*, 17 S. & R. R. 16. *Heron v. Hoffner*, 3 Rawle R. 396, S. P. *Stark et al. v. Hutton et al.* 1 Saxton, N. J. Ch. Rep. 216. 225. *Gest v. Flock*, 1 Green's N. J. Ch. Rep. 108. *Blunt v. Gee*, 5 Call's Rep. 481. *Quarles v. Garnett*, 4 Desauss. Ch. Rep. 146. *Upshaw v. Upshaw*, 2 Hen. & Munf. R. 3. *Allen v. Pray*, 3 Fairf. (Me.) Rep. 138. *Reed v. Dickerman*, 12 Pick. R. 149. *Perkins v. Little*, 1 Green. R. 148. *Steel v. Fisher*, 1 Edw. Ch. Rep. 435. *Clay v. Hart*, 7 Dana R. 6. *Watkins v. Watkins*, 7 Yerger R. 283. Judge Story in 2 Eq. Jur. § 1075 et seq. ch. xxx. who cites and relies upon Mr. Swanston's note (a), to *Gretton v. Howard*, 1 Swanst. R. 433—458, where the English cases before 1818 will be found collected and commented on : and in note (b), 1 Swanst. R. 394, the case of *Dillon v. Parker*, where an equally elaborate and able note may be found. *Arnold v. Kempstead*, 2 Eden's R. 236, Mr. Eden's note.

25. If the party has mortgaged the interest he takes in his own right, and then is suffered to elect to take under the will, the mortgage must be satisfied out of the interest provided for him by the will.(a)

(a) *Rumbold v. Rumbold*, 3 Ves. jun. 65.

To constitute an election by a widow to accept a legacy bequeathed to her in lieu of dower, there must be something more than a mere intention or determination to elect.

A declaration of such intention, even if made to those interested, will not of itself constitute an election at law.

There must be some decisive act of the party, with knowledge of her situation, and rights, to determine the election, or an intentional acquiescence in such acts of others as are not only inconsistent with her claim of dower, but render it impossible for her to assert her claim without prejudice to the rights of innocent persons.

Signing a petition to the legislature for a sale of the real estate of the testator, to enable the executors to pay the legacies, and execute the various trusts mentioned in the will, if the petition was never acted on, will not constitute a legal election. Nor will the fact that an answer to a Bill in Chancery was filed in her name, assenting to a decree for the sale of the real estate of the testator, to carry into effect the trusts of the will (one of which was the payment of the annuity bequeathed to the widow in lieu of her dower), and a decree made for such sale, constitute an election, if it appear that she was merely quiescent in the matter, and that the answer as filed was neither signed nor assented to by her.

What acts of acceptance or acquiescence are sufficient to constitute an election, cannot be designated with sufficient precision to justify a general rule. Each case as it occurs must be governed by its own peculiar circumstances. The general questions are, whether the parties acting or acquiescing were cognizant of their rights; whether they intended to make an election; whether they can restore the individuals affected by their claim to the same situation as if the acts had never been performed; or whether these inquiries are precluded by lapse of time. *English v. English*, 2 Green's N. J. Ch. Rep. 504—509.

A testator by his will directed that when his youngest child attained the age of twenty-one years, all his real estate should be sold or divided, whichever a majority of his children then living should think best; and invested his executors, and the survivor of them, with full power and authority to sell, either at public or private sale, as to them might seem most advantageous, all his real estate, in case it should be determined by the election of his children aforesaid, to make sale. *Held*, that the devisees before electing whether to sell or divide the land, had a right to call upon the executor to decide whether in case of a sale he would sell at public or private sale; and if the executor did determine in what manner he would sell, and the devisees were influenced by that determination in making their election to have the property sold, the executor could not alter his determination without giving the heirs an opportunity of altering their decision upon the question of sale or division. *Wright's executor v. Wright*, 3 Green's N. J. Ch. Rep. 28. 1 Jarman on Wills, 385. 397. notes Perkins's Ed., where many cases both English and American are cited

26. Where the claimant is an infant, or feme covert, it is usually referred to the Master, to see which is most for their benefit, to take under or against the will, but where the interest given by the will is manifestly a better interest, no reference will be made.(b)

[*155] 27. Where a person elects to take in opposition to the will, the interest given to him will be applied in compensation of the disappointed devisees.(c) But the estate thus taken in opposition to the will of course vests in the party, with all the legal consequences attached to it. Thus where a tenant in tail devised away the estate, and gave the issue in tail, who was a married woman, and also her husband, other benefits by his will, she elected to take her estate-tail in opposition to the will, but her husband of course took under the will, then his wife died, and he entered as tenant by the courtesy : and it was contended, that as he took under the will, he could not claim in opposition to it : but it was ruled, that his wife took the estate with all its legal incidents, and that consequently he was entitled to be tenant by the courtesy in right of *her* seisin, although he claimed under the will in his own right.(d)

28.* In a case where the income of a Scotch heritable bond and other property was given to the widow for life, and she was entitled to right of terce in the bond, and a case of election being raised by the will, the heir elected to take the bond against the will, by which the income intended for the widow under the will was diminished, still as she elected to take under the will, she was held bound to bring in her terce as part of the testator's estate.(e)

29. Closely allied to election is the doctrine of satisfaction : (1) where the interests of the objects of the power are satisfied by

(b) *Wilson v. Lord John Townshend*, 2 Ves. jun. 693.

(c) See before, and *Anon. Gilb. Eq. Rep.* 15; *Ward v. Baugh*, 4 Ves. jun. 627.

(d) *Lady Cowan v. Pulteney*, 2 Ves. jun. 544; 3 Ves. jun. 384. See *Brodie v. Barry*, 2 Ves. & Bea. 127.

(e) *Reynolds v. Torin*, 1 Russ. 129.

the donee of the power, their claim on the fund ceases.(f) As this question, however, seldom arises upon powers, and the doctrine of satisfaction is already discussed by other writers, I shall not stop to inquire what is in equity deemed a *satisfaction*. *But it may be remarked that, as in case of elec- [*156] tion, so in cases of satisfaction, parol evidence is admissible to show that the testator considered the property subject to the power as part of his own property.(g) And to create a case of satisfaction, a gift must move from the person himself. Therefore if a man having a charge on his estate, and also a power over his wife's estate, both in favour of his child, appoint a sum to be paid to the child out of his wife's estate, in satisfaction of the charge on his own, the declaration as to the satisfaction will be entirely void.(h) Satisfaction can never be presumed where the intention of the donor is expressly stated: as where a man by his will appoints a portion under a power, and gives an annuity out of his own property to the same child, and then upon marriage gives the child a portion, which he declares to be in satisfaction of the annuity given by the will, no presumption of satisfaction can be raised as to the portion appointed under the power.(i)

(f) *Smith v. Lord Camelford*, 2 Ves. jun. 668; *Folkes v. Western*, 9 Ves. jun. 456, see post, ch. 15; *Savage v. Carroll*, 1 Ball and Beatty 265.

(g) *Hinchliffe v. Hinchliffe*, 3 Ves. 516; and see *Druce v. Dennison*, 6 Ves. jun. 309; *Clementson v. Gandy*, 1 Kee. 309.

(h) *Roberts v. Dixall*, 2 Eq. Ca. Ab. 668, pl. 19. See the case in vol. 1, 486, supra.

(i) *Burgess v. Mawbey*, 10 Ves. jun. 319. See *Powys v. Mansfield*, 6 Sim. 528.

[*157]

SECTION VI.

OF NON-EXECUTION.

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| 1. Not aided even in case of sudden death. | 18. Cases establishing the implication. |
| 2. Power not executed for creditors. | 23. Gift implied from the limitation over. |
| 3. Distinction where a power is in the nature of a trust. | 24. Implication co-extensive with power. |
| 4. Articles creating a power held to give an interest. | 25. Implication rebutted by gift over in default of appointment. |
| 6. <i>Harding v. Glyn</i> : power a trust, although exclusive. | 27. Gift to the objects with a power of distribution. |
| 9. Observation on the cases. | 33. Power in inaccurate settlement construed to give the property. |
| 10. Power with a gift by implication. | 34. What is absolute property with a simple request and not a power. |
| 11. <i>Duke of Marlborough v. Godolphin</i> , a power only: doubted. | 36. <i>Wright v. Atkyns</i> . |
| 12. Distinction between that case and <i>Harding v. Glyn</i> . | 37. <i>Heneage v. Lord Andover</i> . |
| 14. <i>Crossling v. Crossling</i> , with observations. | 40. Donee not deprived of power. |
| 16. Power to appoint to one of a class, no gift by implication. | 43. Court never exercises a discretionary power. |
| | 44. Gift implied and power not exercised; an equal distribution. |

1. SOME of the cases in the preceding section are, in strictness, cases of non-execution, where the remainder-man is compelled to make good the disposition, on the ground of fraud or election; but putting aside these cases, although equity will, as we have seen, in favour of a purchaser, creditor, wife or child, supply the defective execution of a power, it is an immutable rule, that a non-execution shall never be aided. (*k*) It is no ground [*158] for relief that the party intended to exercise his power, but was prevented by sudden death. (*l*)

2. We have seen, that where a man has a general power of appointing a fund, and he exercises the power in favour of a volunteer, equity will, in exclusion of the appointee, seize upon the funds as assets for the payment of the debts of the person executing the power: but if the party will not execute the power, the Court cannot compel him to do so, nor can it affect the fund subject to the power in favour of the creditors, for that would be against the nature of a power which is left to the free will and

(*k*) *Arundell v. Philp*, 2 Vern. 69; *Tomkyn v. Sandys*, 2 P. Wms. 228, n.; *Wilm.* 23; *Bull v. Vardy*, 1 Ves. jun. 272.

(*l*) See *Pigott v. Penrice*, Com. 250; *Gilb. Eq. Rep.* 138.

election of the party to execute it or not, for which reason equity will not say he shall execute it, or do that for him which he does not think fit to do himself. *(m)* This may seem rather a refined distinction, but it is well established; *(n)* and the Court cannot execute a mere power where the donee declined to do so.

3. But in laying down this broad rule, we must be careful to distinguish between mere powers, and powers in the nature of trusts. The distinction between a power and a trust is marked and obvious. "Powers," as Lord C. J. Wilmot had said, *(o)* "are never imperative;" they leave the act to be done at the will of the party to whom they are given. Trusts are always imperative, and are obligatory upon the conscience of the party intrusted. But sometimes trusts and powers are blended: a man may be invested with a trust to be effected by the execution of a power given to him, which is in that case imperative; and if he refuse to execute it, or die without having executed it, equity, on the general rule that the trust is the land, *(p)* will carry the trusts into execution at the expense of the remainder-man, and without any regard to the person in whose favour it is to be executed, being a mere volunteer, and not a purchaser, creditor, wife or child. This is the case where the power is [*159] given by a will to trustees to sell an estate, and apply the money upon trusts. The power is in the nature of a trust. The legal estate, until the execution of the power, of course descends to the heir-at-law, *(q)* and if the power be defeated at law by the death of the person to whom it was given, the legal estate would *remain* in the heir-at-law for his own benefit; but equity, acting upon the trust, will compel the heir to join in the sale of the estate for the purposes designated by the testator; *(r)* (1)

(m) Per Master of the Rolls, in *Tollet v. Tollet*, 2 P. Wms. 489.

(n) *Holmes v. Coghill*, 7 Ves. jun. 403; 12 Ves. jun. 206; *Hixon v. Oliver*, 13 Ves. 114.

(o) *Wilb.* 23.

(p) See *Bargess v. Wheate*, 1 Blackst. 162, per Lord Mansfield.

(q) *Warnford v. Thompson*, 3 Ves. jun. 513; *Hilton v. Kenworthy*, 3 East, 553; and see *Co. Litt.* 236 a.

(r) *Garfoot v. Garfoot*, 1 Cha. Ca. 35; *Gwilliams v. Rowell*, Hard. 204; *Auby v. Doyl*, 1 Cha. Ca. 180, cited, reported in 1 Cha. Rep. 89, nom. *Amby v. Gower*; and see *Witchcot v. Souch*, 1 Cha. Rep. 97.

(1) *Osgood v. Franklin*, 2 Johns. Cha. R. 20, S. C. 14; *Johns. R.* 171.

and on the same principle, the same equity is extended to those cases, where, although in words a power is given, it never arises, because the testator has omitted to appoint some person to execute it.(s)

4. In *Savage v. Carrol*.(t) by articles previous to a marriage, for the strict settlement of an estate, it was agreed, "that the settlement should contain a clause empowering the husband to charge 1,000*l.* for the younger children of the marriage." Lord Manners seemed to be of opinion, that if the Court had been called upon to direct the execution of a settlement pursuant to the articles, the Court would insert a clause to charge the estate as a provision for the younger children, with a power only to the father to apportion the shares.

5. The question, whether a power is simply such, or a power in the nature of a trust, commonly arises on a power to appoint to a man's children(u) or relations. In *Brown v. Higgs*.(x)

Lord Eldon stated the principle of all the cases on [*160] this subject to be, that if the power is a power which it is the duty of the party to execute, made his duty by the requisition of the will, put upon him as such by the testator, *who had given him an interest extensive enough to enable him to discharge it*, he is a trustee for the exercise of the power, and not as having a discretion whether he will exercise it or not; and the Court adopts the principle as to trusts, and will not permit his negligence, accident, or other circumstances, to disappoint the interests of those for whose benefit he is called upon to execute it.(1)

(s) *Heyer v. Wordale*, 2 Freem. 135, cited; *Locton v. Locton*, 2 Freem. 126; *Pitt v. Pelham*, 1 Cha. Ca. 176; 1 Cha. Rep. 149; 2 Freem. 134; 1 Lev. 304, which was against the trust, but reversed in Dom. Proc.; and see *Carvill v. Carvill*, 2 Cha. Rep. 156.

(t) 1 Ball & Beatty, 265.

(u) See *Jones v. Clough*, 2 Ves. 267; and see 5 Ves. jun. 856.

(x) 8 Ves. jun. 574. See *Toldervy v. Colt*, 1 You. & Coll. 621. 643.

(1) See the note to *Grimke v. Grimke's Ex.*, 1 Desauss. Ch. R. 375.—Note to 1st Am. Ed.

See 1 Jarman on Wills, 33, Perkins's note (1); 2 Story's Eq. Jur. § 1063, 1064, and notes. 4 Kent's Com. 324, 5th. ed. *Thompson v. Murray*, 2 Hill's S. C. Ch. Rep. 214.

6. Thus in *Harding v. Glyn*,^(y) *Harding* devised certain articles to his wife, "but did desire her, at or before death, to give the same unto and amongst such of *his own relations* as she should think most deserving and approve of." The Master of the Rolls held this to be a trust for the relations in default of appointment. He said that it operated as a trust in the wife, by way of power, of naming and apportioning, and her non-performance of the power should not make the devise void, but the power should devolve on the Court.

7. So in^(z) *Brown v. Higgs*, a leasehold estate was bequeathed to A. ; and after directing him to pay certain sums, the testator empowered him to employ the residue of the rent "to such children of my nephew Samuel Brown, as the said A. shall think the most deserving, and that will make the best use of it, or to the children of another nephew, if any such there were or should be:" and this was considered, in default of appointment, as a trust for all the children of both the nephews. Lord Alvanley thought the fair construction was, that at all events the testator meant it to go to the children, and the words of appointment he used only to give a power to A. to select some and exclude the others. He affirmed the decree on a re- [*161] hearing,^(a) and Lord Eldon affirmed it upon an appeal,^(b) and it was ultimately confirmed in the House of Lords.

8. Again, in *Forbes v. Ball*,^(c) a gift of 500*l.* to the testator's wife, and it was his will and desire that she might dispose of the same amongst her relations, as she by will might think proper, with a gift of the residue of his estate to her for life, and then to others, were held as to the 500*l.* to be a trust for the wife's relations, subject to her appointment.

9. In all these cases, although in terms no obligation was imposed on the donee to exercise the power, and although in

^(y) 1 Atk. 469; S. C. stated from the Register's book, 5 Ves. jun. 501; 8 Ves. jun. 571, from Mr. Joddrell's note; *Birch v. Wade*, 3 Ves. & Bea. 198.

^(z) *Brown v. Higgs*, 4 Ves. jun. 708; *Burrough v. Philcox*, 5 Myl. & Cra. 73.

^(a) 5 Ves. jun. 495.

^(b) 8 Ves. jun. 561; and see *Paul v. Compton*, *ibid.* 375; *Cruwys v. Colman*, 9 Ves. jun. 319; and see *Madoc v. Jackson*, 2 Bro. C. C. 588, and 4 Ves. jun. 792, n. (a); *Davy v. Hooper*, 2 Vern. 665; 1 Bro. P. C. 351; *Attorney-general v. Bradley*, 1 Eden, 482; *Beever v. Partridge*, 11 Sim. 229.

^(c) 3 Mer. 437.

some he had a discretion to select from the class the individuals to take, yet as the property was given to him generally with such a power, and his own interest was confined to his life by plain construction, an intention was collected that the interest beyond his own life was to vest in the objects, and that he having a sufficient estate for that purpose, and a power, was bound to give effect to that intention; and his neglect to exercise his discretion, or to execute his power amongst the objects—where none was to be excluded—was not permitted to operate to the detriment of his *cestuis que trust*; for such the objects of a power in the nature of a trust really are, although the person to whom the power is given has more than the authority of a common trustee.

10. There is a class of cases which it is difficult to distinguish, where the power is not treated as in the nature of a trust, nor is there an express gift to the objects; but the gift is so framed as to contain in itself both a power, and a gift *by implication* *to the objects of the power in default of appointment. But this doctrine has not been established without a struggle.

11. In *The Duke of Marlborough v. Godolphin*,^(d) A. devised a legacy of 30,000*l.* to his wife for life, “and after her decease to be divided and distributed to and amongst such of his children, and in such manner and proportion, as she by any deed, &c. should direct and appoint; and for no other purpose whatever.” Lord Hardwicke held it to be a mere power, and not a trust for the children in default of appointment.^(e) He appears to have drawn a distinction between a bequest “amongst my children as A. shall appoint,” which he considered as a trust, and a bequest amongst *such* of his children, &c., which he held to be a mere power. He considered the power in the principal case as given to secure her the respect of her children. He observed, the next morning after deciding the case, that he had forgot to take notice of the cases cited for the defendants, but that one answer to them all

^(d) *Duke of Marlborough v. Godolphin*, 2 Ves. 61; 5 Ves. jun. 506, stated from Reg. Lib.; S. C. MS.

^(e) And see *Bull v. Vardy*, 1 Ves. jun. 270; *Target v. Gaunt*, 1 P. Wms. 432; *Burrough v. Philcox*, 5 Myl. & Cra. 73.

was, that they were all cases where the bequest amounted to a legacy to all the children, as where it was "to be divided among all my children," it amounted thereto, being still legatory words, whether it was by the word give or devise; and the person would be obliged by the Court to give something to every one of the children; consequently only the proportions were entrusted to the appointor; the objects were fixed.

12. In *Brown v. Higgs*, upon the appeal, Lord Eldon observed that *The Duke of Marlborough v. Lord Godolphin* was certainly very difficult to reconcile with *Harding v. Glyn*, or with the case before him. But the question was not whether one case was to be reconciled with others, but whether all the cases had gone upon a principle which professed "to save [*163] whole *Harding v. Glyn*. Lord Hardwicke, in *The Duke of Marlborough v. Lord Godolphin*, did not say that where there is a power, and it is made the duty of the party to execute it, and he would not execute it, in such a case this Court would not act; but he collected from the scope and object of the disposition in that case, taken altogether, the opinion, that it was a case in which the person having a power to dispose of the sum of 50,000*l.*, had a mere power, not clothed with any duty requiring her to execute it; and therefore as to what was not disposed of the Court could not interfere.(f) In another passage he said that the case of *Harding v. Glyn* could not be got rid of by saying that it was a singular case, and that it was difficult to reconcile all subsequent cases with it; for that case had been treated as a clear authority, probably for the whole, certainly by his own experience, for a very considerable part of the time elapsed since that judgment was pronounced.

13. There is no doubt a clear distinction between *Harding v. Glyn*, and *The Duke of Marlborough and Godolphin*, as in the former case the interest was wholly vested in the donee of the power, and in the latter she was expressly made tenant for life; but in both the donee had a power of selection, and the terms of the power in the latter case manifested an intention that the objects should not be disappointed: To his wife for life, and after her decease *to be divided and distributed* amongst such of his

(f) 8 Ves. jun. 569, 570.

children as she should appoint. Now, as the right to exclude some does not prevent the class from taking in default of appointment, it should seem that if a case in the very terms of the Duke of Marlborough and Godolphin were now to occur, it would be decided, that the children took as tenants in common in default of appointment, either by implication, which seems the true construction, or because the power was coupled with a trust. (g)

[*164] 14. In *Crossling v. Crossling*, (h) the devise was of a freehold estate to the wife for her life, “and she shall dispose of the same amongst my children by her, at her decease, as she shall think proper.” The wife did not exercise the power, and upon an ejectment by the heir the children filed their bill for an injunction. But the Court of Exchequer said that the cases referred to were cases in which a fund was by the will given *absolutely*, but after such bequest there followed words of desire or recommendation in favour of certain persons after the death of the first legatee: there the Court had holden the first legatee to be a trustee for the persons so recommended, and had given the fund accordingly after his death; but in this case there was an express devise of a real estate to the wife for *her life*, with a *power* for her to dispose of it amongst the children, which power she had never executed. The consequence was, that the estate descended after her death to the heir-at-law, and there was no instance of the Court declaring an heir-at-law (who claimed *dehors* the will) to be a trustee for the objects of such a power. (1)

15. In this case an estate for life only was given to the wife, and therefore she was entrusted with no estate, nor was there a gift over from which an intent could be collected. But still the terms of the devise appear to denote an intention that the wife should exercise the power; “*and she shall dispose of the same*,” and the whole class was to take. It might properly have been considered a power which it was imperative on her to execute.

16. In the before-mentioned case of *Brown v. Higgs*, one estate

(g) See 5 Myl. & Cra. 90. 95.

(h) 2 Cox, 396.

(1) Bull v. Bull, 3 Day R. 384. Knight v. Yarboro, Gilmer (Va.) Cas. 27. Den v. Crawford, 3 Halst. R. 102. Mitchell v. Johnson, 6 Leigh's R. 461. Hudson v. Hudson, 6 Munf. R. 356.

was devised "to one of the sons of my nephew Samuel Brown, as he shall direct by a conveyance in his lifetime or by his will." This point did not call for a decision, but Lord Alvanley seemed to think it a mere power. Lord Eldon's opinion cannot be easily ascertained. But unless every power of this nature is to be converted into a trust, or which is the same thing, [*165] a power the donee is bound to execute, this clearly was a simple power. A power to give to such as a donee may select of a class, may be considered as including the whole class, for, although any may be selected, yet the whole may be objects of the power; whereas a power to appoint to such one of a class as a person shall name, authorizes a gift to one only of the class; no larger number, much less the whole class, can be made objects of the power. If, therefore, the power is in the nature of a trust, or there is a gift in the power itself by implication, it can only be commensurate with the power, and therefore for one only of the objects. Which one would be the proper *cestui que trust*, or the person in whose favour the implied gift was made?

17. We may now state the cases in which the objects of a power have been held to take in default of appointment, although the donee was confined to a life estate and there was no direct devise to the objects.

18. In *Mason v. Limbery*,⁽ⁱ⁾ a bequest to A. for life, whom the testator "desired at his death to give it amongst his children, and the children of his said daughter, as he should think fit," was holden by Lord Talbot to be a devise to the children in default of appointment, and the children were accordingly decreed to be entitled to the fund, although A. died in the lifetime of the testator. And there are other cases to the same effect,^(k) some of which we shall have occasion to consider when we treat of a power to appoint to relations.^(l)

19. So in *Kemp v. Kemp*,^(m) a gift of the residue to the

(i) T. Term, 1734, MS.

(k) *Davy v. Hooper*, 2 Vern. 665; 6 Bro. P. C. 51; *Maddison v. Andrew*, 1 Ves. 57; *Hockley v. Mawby*, 1 Ves. jun. 143; *Morgan v. Surman*, 1 Taunt. 289; *Witts v. Boddington*, 3 Bro. C. C. 95; 5 Ves. jun. 503, stated from Lib. Reg.; *Reade v. Reade*, 5 Ves. jun. 744; *Longmore v. Broom*, 7 Ves. jun. 124.

(l) Vide chap. 14.

(m) 5 Ves. jun. 849. See *Fowler v. Hunter*, 2 Yo. & Jerv. 506; *Brown v. Pocock*, 6 Sim. 257.

[*166] "testator's cousin for life, and then to be disposed of amongst her children as she should think proper, was considered to be a gift of the fund to the children in default of appointment, and an invalid appointment was treated as no appointment.

20. There is more difficulty where, as in *Longmore v. Broom*,⁽ⁿ⁾ the person named has a discretion, and can prefer even one class to another: and yet even in such a case, if an intention can be collected to give the fund to the objects, they will take it though there is no appointment.^(o)

21. In *Jones v. Torin*,^(p) in which *Longmore v. Broom* was not cited, a sum of money was bequeathed to trustees for the testator's daughter for life, and upon her decease he gave the same to the children, or their descendants, of other persons, in such proportions to each as his daughter might by her will or any other written declaration during her lifetime direct. The daughter did not exercise the power, and it was held that the descendants were mentioned merely as substitutes for the children. There was a direct gift with a power of selection.

22. In *Grierson v. Kirsopp*,^(q) the testator gave by his will to his wife during her widowhood, for the benefit and advantage of his children, either to hold or dispose of his estate A., as she might find most convenient, but if she desired to dispose of the same, it was to be managed by trustees. By a codicil he empowered his wife, with the assistance of the trustees named in the will, to sell all his estates, and the money thence arising, with his personal estate, "she shall and may divide and proportion amongst my children as she shall think fit and proper, or as she shall direct or order" by her will. The widow did not sell, and survived all her children and made no valid appointment. It was held that she took a life interest, with a power to sell the real estate, which was in the nature of a trust, and that,
[*167] "subject to such appointment as the widow might have made, the children were entitled in equal shares as property converted into personalty.

(n) 7 Ves. jun. 124.

(o) Ibid.

(p) 6 Sim. 255.

(q) 2 Kee. 653.

23. Sometimes the gift to the objects of the power is implied from the event upon which the property is given over to third persons. Thus, in *Witts v. Boddington*,^(r) the gift by will was to the wife for life, of certain articles of personalty, with power for her by her will or otherwise to give and bequeath the same unto or amongst some or one of the child or children of his daughter, in such manner and proportions as his wife should think proper: *but in case no such children of his daughter should be alive at the time of his wife's decease*, then he desired or directed her to give or leave the same unto his own relations. The gift over was considered as decisive of the intention, that if there were children they should have the property, and accordingly no appointment having been made, they were decreed to take it equally.

24. Where the objects of the power take by implication from the words of the power itself, those only can take in default of appointment who were capable of taking by appointment.^(s)

25. But where there is a gift over *in default of appointment* to the objects of the power or to other persons, of course the words of the power cannot operate to vest any estate in the objects of it by implication, if there be no appointment.^(t)

26. But a gift over to prevent a lapse, to the objects of the power, which does not take place, will not prevent the implied gift arising from the power itself. This was decided in *Kennedy v. Kingston*^(u) where the gift was of a sum of money 'to one for life, and at her decease to divide it in por- [*168] tions as she shall choose to her children, and in case she died before him, he left the sum to be equally divided amongst her children. It was held, that the power embraced only children living at the donee's death: but that it must be understood as tacitly including a provision for an equal division of the fund amongst the objects, in the event of no appointment being made. Two who survived were therefore the only persons to take; they only could take under an appointment, and if no appointment

(r) 3 Bro. C. C. 95; 5 Ves. jun. 503.

(s) *Walsh v. Wallinger*, 2 Russ. & Myl. 73. See *Woodcock v. Renneck*, 4 Beav. 199.

(t) *Jenkins v. Quinchant*, *Pritchard v. Quinchant*, 5 Ves. jun. 596, n.; *Ambl.* 146.

(u) 2 Jac. & Walk. 431.

were made they would take by necessary implication. The question, the Master of the Rolls said, was, upon the clause in case of the legatee for life dying before the testatrix, the sum was to be equally divided amongst the children; and it was said that the mention of one event upon which they were to take in default of appointment, was an exclusion of any other; and that it was, therefore, not meant to go to them except upon an event that had not happened. But this did not appear to him to be a necessary consequence. She might die in the lifetime of the testatrix; she might survive and make a complete appointment, or she might survive and make an incomplete appointment. There was no provision in express terms for the event which had actually happened, of her surviving and making an incomplete appointment, or for her making no appointment at all; but that is quite consistent with the express provision for her dying before the testatrix, as in that event the fund was not disposed of by the previous part of the will. It did not, therefore, seem to him that this provision annihilated the implication arising from the previous part of the sentence, which he considered as embracing a power to appoint to the children who should survive, with a gift to them in default of appointment. The two survivors, therefore, were entitled alone to the whole sum.

27. There is still another class of cases where the ['169] property is actually given to the objects, but the shares or interests are to be apportioned by a third person; and there of course the objects will take although the power be not executed, but this is by force of the original gift; and in some of these cases the intention is still more strongly marked by the gift over, which is not in default of appointment, but for default of the objects.

28. Thus where a marriage settlement of some annuities was made by the husband, in trust for himself for life, remainder to his wife for life, remainder to his children, in such manner as he should appoint, *and if no children*, to his executors, administrators and assigns. The father died without having made any appointment, and there was an only child of the marriage. Lord

Hardwicke was of opinion that the child was entitled under the settlement to the annuities as an interest vested in her, and that the father had only a power reserved to him of making such disposition thereof amongst his children as he thought proper, and there being only one child, that she was entitled to the whole.(x)

29. In *Hockley v. Mawbey*,(y) a devise of freehold and leasehold estates to the testator's son, and his issue lawfully begotten, or to be begotten, to be divided amongst them as he should think fit, *and in case he should die without issue*, over, was held as to the leaseholds, to be a gift to the son for life, and after that to his issue in such distributive shares as he should appoint. Lord Thurlow observed, that it had been said that this might be interpreted to be a gift to the son in tail, with a power annexed to raise a future use upon it of the description mentioned. As to that he apprehended that in case there had been children of the son, it was not intended to be left in his power to determine whether he should or should not consider it as his own, and raise a future use if he pleased; but the disposition gave an interest to his children, and a title to insist upon an estate in the premises so given at all events, and then the son has no authority
*but as to the proportions in which they were to take, [*170] but not to choose whether anything should be given to them or not.

30. So upon a devise to the wife for life, and after her decease unto her children, to be parted among them as she should appoint, Mansfield, C. J., thought that all the children would have taken if there had been no appointment.(z)

31. So a devise unto and among his three children and their lawful issue, in such proportions, &c. as his wife should appoint, without any gift over in default of appointment, was held to give the children estates tail.(a)

32. In *Casterton v. Sutherland*,(b) an estate was devised to the testator's wife for life, and after her death unto and amongst all and every their children, in such manner *and in such proportions*

(x) *Bellasis v. Uthwatt*, 1 Atk. 426.

(y) 1 Ves. jun. 143.

(z) *Morgan v. Surman*, 1 Taunt. 289.

(a) *Martin v. Swannell*, 2 Beav. 249.

(b) 9 Ves. jun. 445.

as she should appoint. He authorized her to sell the estate and invest the money, and receive the interest for her life, and after her death he directed both principal and interest to be paid to and among their children *in such proportions as aforesaid*. All the children who survived the testator died in their mother's lifetime, and she died without having made any appointment; and Sir W. Grant was clearly of opinion that this was a tenancy in common among the children, subject to the power of appointment, and that upon the whole of the devise they took the fee.

33. In *Bushell v. Bushell*, (c) by an inaccurate settlement upon a marriage, leaseholds for lives were settled to the use of the husband for life, with remainder to the issue to be begotten by him on the wife, in such shares and proportions as they should appoint. Lord Roddale said, that the whole of the instrument was incorrect; it seems to have been considered only as [*171] notes for a future settlement; the *children were intended to take not by appointment merely, but also in default of appointment, though no such provision was inserted. The deed would be rectified accordingly, and the consequence would be that, subject to the power of appointment, the children would be tenants in common.

34. In the cases hitherto discussed *powers* were actually created, and the question was, whether they were strictly such, or *in the nature* of trusts, (1) or whether they contained, expressly or by implication, a gift to the objects. But there are cases yet to be considered in which the question is, whether any power, properly so called, is created, and the contest is between an absolute right of property in the donee, and a power in the nature of a trust for the benefit of certain objects.

35. In *Harland v. Trigg*, (d) leaseholds for lives were given to the uses of a previous devise of real estates, "all other leaseholds

(c) 1 Scho. & Lef. 90; and see *Mavoe v. Jackson*, 2 Bro. C. C. 588; 4 Ves. jun. 792; 1 Scho. & Lef. 293.

(d) 1 Bro. C. C. 142; *Macey v. Shurmer*, 1 Atk. 389.

(1) See *Wells v. Sloyer*, 3 Penn. L. J. 203. See especially p. 210, 211.

to John Harland forever, hoping he will continue them in the family." Lord Thurlow held that the objects must be distinct. Where there is a choice, it must be in the power of the devisee to dispose of it either way. The words did not clearly demonstrate an object, and he held it *not* to be a trust.

36. In *Wright v. Atkins*,^(c) the devise was of his freehold, copyhold and leasehold estates unto his mother, and her heirs forever, in the fullest confidence that after her death she would devise the property to his family. The words in the fullest confidence were held sufficient to create a trust, if there was no uncertainty in the object, and it was decreed that the mother was tenant for life, with remainder in trust for the devisors' heir as *persona designata*, and as tenant for life she [*172] was restrained from cutting timber.^(f) Upon an appeal to the House of Lords, after elaborate arguments, it was held that she was not a bare tenant for life, and the case was remitted to the Court of Chancery. Lord Eldon then gave her liberty to cut timber in an husbandlike manner, as tenant in fee, giving security for the value or bringing the value into Court. Upon a second appeal to the House of Lords that order was reversed, and she was declared entitled to cut the timber as tenant in fee, leaving the question open as to the person entitled to the property at her death.^(g) And it was declared that, according to the true construction of the will, the intention of the testator must be taken to have been to give to the mother a right to cut the timber for her own use. The principle of the decision was, that the actual devise to the mother should not be cut down further than was necessary to give effect to the ultimate trust, if one was declared.

37. In *Heneage v. Lord Andover*,^(h) which was heard in the House of Lords⁽ⁱ⁾ under the name of *Meredith v. Heneage*, upon

(c) 17 Ves. jun. 255; 19 Ves. jun. 299; Coop. 111; Grant v. Lyman, 4 Russ. 292; Bland v. Bland, 2 Cox, 349; Lawless v. Shaw, Rep. temp. Sugden, 154; Hoy v. Martin, 6 Sim. 568; Wood v. Cox, 1 Kee. 317.

(f) 1 Ves. & Bea. 315.

(g) Cases D. P., 7 July 1823, MS. The writer was one of the counsel for the appellant.

(h) 10 Price, 230.

(i) 10 Price, 306; 1 Sim. 542.

conflicting declarations, it was held that no trust was created, as the testator declared that he had given to his wife his estate unfettered and unlimited, although he added, in full confidence, and with the firmest persuasion that in her future disposition and distribution thereof she would distinguish the heirs of his late father, by devising the whole of his estate, together and entire, to such of his father's heirs as she might think best deserved her preference.

38. In *Sale v. Moore*,^(k) the testator gave to his wife all his worldly substance, upon trust to pay his debts and funeral expenses, a legacy to a charity, and an annuity to one of [473] his next of kin, adding, that his brother being "in affluent circumstances, and his eldest sister being already provided for by him, would, he trusted, be considered by them as a sufficient reason for his not leaving them any thing in his will, as he could not do it without taking from his wife's property, who was more in need of it. The remainder of what he died possessed of he left to his wife, recommending her, and not doubting, as she had no relations of her own family, but that she would consider his near relations should she survive him, as he should consider them himself in case he should survive her: it was held that no trust was created.^(l)

39. These cases show the disinclination of the Courts to create a power, properly so called, upon words of recommendation, where the absolute property is given to the person to whom the recommendation is addressed, although clearly if a sufficient intention appears to create a power, or a trust through the medium of a power, words of recommendation will be sufficient to raise it.⁽¹⁾

(k) 1 Sim. 534.

(l) And see *Benson v. Whittam*, 5 Sim. 22; *Lechmere v. Lavie*, 2 Myl. & Kee. 197.

(1) But few cases on this subject have occurred in the United States. In *Erickson v. Willard*, 1 N. Hamp. 217, E. F. devised all his estate to J. W. and appointed him his executor. In the will was this clause. I desire that the said J. W. should, at his discretion appropriate a part of the income of my estate aforesaid, not exceeding \$50 a year, to the support of my widow M. E. It was held that this clause, with other expressions, rendered the devise to J. W. a trust to the above amount, which a court would enforce. In *Collins v. Carlisle*, 7 B. Monroe, 14, the words "to be disposed of and divided among my children," were held to control the prior devise to his wife, and create a trust for the children. A devise to two executors of the residue

40. As we shall hereafter see, where a power is given to one to appoint amongst a class of persons as relations, or to select any

of a testator's estate, "with full confidence that they will dispose of such residue among our brothers and sisters and their children, as they shall judge shall be most in need of the same; this is to be done according to the best of their discretion," creates a trust in favor of the needy brothers, &c, which, on the death of the trustees without exercising it, devolves on the court. *Bull v. Bull*, 8 Conn. 47. In *Lucas v. Lochart*, 10 Sm. & M. 466, a husband by his will gave to his wife the entire profit of all his estate during her life, "entrusting to her the education and maintenance of his children, and provided also for the education and maintenance of the children out of the profits" of the estate, and it was held that the wife took the estate, coupled with the trust for the education and support of the children. This doctrine of the creation of trusts by precatory words was a good deal discussed in Virginia, in *Harrison v. Harrison*, 2 Gratt. 1. There, a testator had made his will in these words: "In the utmost confidence of my wife, I leave to her all my worldly goods, to sell or keep for distribution amongst our dear children as she may think proper. My whole estate, real and personal, is left in fee simple to her, only requesting her to make an equal distribution amongst our heirs, and desiring her to do for some of my faithful servants, whatever she may think will most conduce to their welfare, without regard to the interest of my heirs. Of course I wish first of all that all my debts shall be paid." The court of appeals, Judge Brooke dissenting, held, 1. That the widow was invested, subject to the payment of the testator's debts, with the legal title to the whole estate, real and personal; taking the beneficial interest in the estate for her life; 2. That the children of the marriage had a vested remainder in fee in the estate, to commence in possession at the widow's death, or earlier, at her election; 3. That the widow might make advancements to the children at her discretion, so that they all ultimately received an equal share of the estate; 4. That she might employ a reasonable portion of the estate for the benefit of the slaves; 5. And that she had power to sell all or any part of the estate real or personal for payment of debts or more convenient enjoyment, advancement, or division. In *Thompson v. McKisick*, 3 Humph. 631, a different conclusion was arrived at. There the bequest was of certain negroes to the testator's daughter, "to be hers forever, to be disposed of as she may think proper amongst her children and grandchildren, by will or otherwise," and it was held that she took an absolute estate, and that there was no trust for the children, &c. The subject of trusts created by precatory words, has recently been very thoroughly considered in Pennsylvania. In Coates' appeal, 2 Barr, 129, a testator had by his will given his real and personal estate, to be possessed and enjoyed by his wife, for life during widowhood, "to be used and applied to the maintenance and support of his children, and at her decease or marriage, should either take place before they came of age, then among them equally." By a subsequent will revoking all others, he devised, after payment of his debts, the use, benefits and profits of his real estate to his wife for life; and also all his personal estate of every description—"absolutely, having full confidence that she will leave the surplus to be divided at her decease justly among her children." It was held there that the widow was entitled to the income for life, merely of the personalty, and was a trustee for the children. The word "surplus" was construed to apply only to what should remain after payment of debts. The same will came again before the Supreme Court, in

of them, if he have not misconducted himself, the Court, upon a bill filed, will still allow him to exercise the power, although under its own eye.(*m*)

41. That rule ought equally to apply to a trust, or power in the nature of one, to executors to pay the testator's personal estate unto and amongst his two brothers and his sisters, or their children, in such shares and at such times as they, or the major part of them, or the survivor of them, his executors or administrators, should in their discretion think proper: and [*174] yet in such a case(*n*) Sir W. Grant, upon a bill filed, took the administration of the fund into the hands of the Court, and excluded the executors from exercising the power, without giving any reason for doing so.

42. So in an early case.(*o*) where a man by his will directed that certain property should be distributed by his two daughters, his executrixes, amongst themselves, their brothers and sister, or to such of them, and in such proportions as they should judge most fit and convenient, according to their needs and necessities; Lord Keeper Wright went much further, and actually exercised

(*m*) *Infra*, ch. 14. *Lord v. Bunn*, 2 You. & Coll. C. C. 98.

(*n*) *Longmore v. Broom*, 7 Ves. jun. 124. See *Robinson v. Smith*, 6 Madd. 194.

(*o*) *Warburton v. Warburton*, 2 Vern. 420; 1 Bro. P. C. 34; and see *Carr v. Bedford*, 2 Cha. Rep. 77.

Mckenkey's Appeal, 1 Harris, 253, when a somewhat different view was taken of its construction. The widow was held to have taken a life estate in the personalty, with a power in trust for the children over the principal remaining at her death; and therefore an appointment by her, omitting one or more of the children, was void. The word "surplus" was there applied to the property in the hands of the widow. These two decisions were merely interlocutory in the cause. In *Mckenkey's Appeal*, 1 Am. Law Reg. 306, 8 Harris 258, however, the case came up for final determination, and after full argument, the former cases were overruled, and the words of the will held not to create a trust. Judge Lowrie, in a very able and learned opinion, traced the origin of the rule, in the earlier English cases, to a misapplication of the provisions of the Roman law, in regard to legacies founded on different principles, and which he declared never to have been adopted in Pennsylvania. The result at which the court arrived, was that words in a will expressive of desire, recommendation, and confidence, are not words of technical, but of common parlance, and are not *prima facie* sufficient to convert a devise or bequest into a trust; but that such words might amount to a declaration of trust when it appeared from other parts of the will, that the testator intended not to commit the estate to the devisee or legatee, or the ultimate disposal of it to his kindness, justice, or discretion. Hill on Trustees, 72, 2d ed., note by Wharton. 1 Williams on Ex., 88, notes to 4th Am. ed.

the power by giving to the heir a double share, as looking upon him to stand most in need thereof; and although the daughters insisted upon their right to exercise the power, the House of Lords affirmed the decree. This has justly been considered a very extraordinary case: (*p*) but the doctrine was not new: in one case (*q*) the whole of the estate was given to the heir-at-law, although the trust was to convey the estate to such of the relations as A should think best and most reputable for the testator's family, the Court judging it most reputable for the family that the heir-at-law should have it.

43. But these cases are not now law. The trustees' discretion was not only taken away, but the Court itself executed the power. Such a power is now disclaimed. (*r*) The Court never exercises a discretionary power. (*s*) But where the trust is under the discretion of the Court, it may fix a period within which the power shall be exercised. (*t*) (1)

(*p*) See 5 Ves. jun. 859; Ambl. 100.

(*q*) *Clarke v. Turner*, 2 Freem. 198; *Mosely v. Mosely*, cited *ib.* See *Finch*, 53.

(*r*) 5 Ves. jun. 850. See *Alexander v. Alexander*, 2 Ves. 640; *Keates v. Burton*, 14 Ves. jun. 437.

(*s*) *Maddison v. Andrew*, 1 Ves. 57.

(*t*) *Piper v. Piper*, 3 Myl. & Kee. 159.

(1) A direction to executors to sell so much of the real estate as they think proper, to pay debts and distribute among the testator's children, may be exercised by a surviving executor; and it is not necessary that he should previously make probate or take out letters testamentary, for his authority is not derived from the registrar.

And where testator directed such sale to be made before a day certain, the power may be exercised after that day, it being in the nature of a trust. *Miller v. Meetch*, 8 Barr. 417.

In this case the following language of Mr. Justice Bell deserves consideration :

"Another objection urged against the validity of the sale as an execution of the power is that it was not made within the time contemplated by the testator. But this is equally destitute of merit with the other objections. It is true that equity will never aid the non-execution of a mere naked power which it is optional with the party to execute or not. These powers are never imperative; they leave the act to be done at the will of the party to whom they are given. But trusts are always imperative, and if it is to be affected by an execution of a power, equity will never suffer it to fail from the negligence of the trustee, but will compel him to execute it: 16 Ves. 26. An instance of this is where a power is given by will to trustees to sell an estate and apply the money on trusts; so where, as in this instance, the proceeds of the sale are to be distributed in a particular way. Though in such cases a direction is given for the execution of the power within a limited period, it may be exercised after the lapse of that period, for the time does not enter into and make part of

44. Where the power is not exercised, although the donee of it had a discretion, and there is no express gift in default of ap-

the power. Where the principal intent is to confer a benefit on *cestui que trusts*, a non-execution of the power within the time limited, shall not be suffered to defeat it. The execution of a power to sell after the time directed, is not like an attempted execution before the time prescribed, as was the case in *Loomis v. McClintock*, 10 Watts, 74. In the latter case, the act of the party is void, for, until the time arrives for its execution, the power has no existence; but after it has sprung into life, where it is coupled with a trust or interest, it continues to exist until exercised." *Miller v. Meetch*, 8 Barr. 424, per Bell, J.

Lord Eldon in his judgment in the case of *Brown v. Higga*, after clearly stating and supporting the distinction between a power and a trust, adds: "There is not only a mere trust and a mere power, but there is also known to the court a power which the party to whom it is given is entrusted and required to execute." And his Lordship afterwards states the principle of the cases to be, that if the power is a power, which it is the duty of the party to execute, made his duty by the requisition of a will, put upon him as such by the testator who has given him an interest extensive enough to enable him to discharge it, he is a trustee for the exercise of the power, and not as having a discretion whether he will exercise it or not; and the court adopts the principle as to trusts, and will not permit his negligence, accident, or other circumstances, to disappoint the interests of those for whose benefit he is called upon to execute." *Hill on Trustees*, p. 67. *Gibbs v. Marsh*, 3 Mete. 243. *Withers v. Yeaton*, 1 Rich. Ch. 324.

A testator devised his real estate and negroes to his son, G. W. in trust, (1) to apply the rents, issues, and profits to the use of himself and family, and the education of his children; and (2) to give or devise by deed or will, the said property, (and the rents, issues, and profits thereof, over and above what he should apply to the uses aforesaid,) "unto all or any child or children by him begotten or to be begotten, in such way or manner and in such proportion and for such uses, estates, and interests, as he shall see fit and proper." G. W. died leaving a will whereby he devised the whole of his estate to his wife with directions to his executors (his wife and sons), to act under "his father's will in trust, and in every respect and manner intended by their grandfather." It was held (1) that the legal title was vested in G. W., coupled with a power in trust to appoint at his discretion among his children, (2) but the power could not be delegated, and (3) that as G. W. had neglected to exercise the power, his children were entitled to divide the property equally. *Withers v. Yeaton*, 1 Rich. Eq. 324.

In *Collins v. Carlisle's heirs*, 7 B. Monr. 14, a husband devised all of his estate after the payment of his debts "wholly to his wife, to be disposed of by her, and divided among his children at her discretion;" and it was held that the wife took an estate for life, with power to give it to her children, or to appropriate it to their use at her discretion; and she dying, the children took the undisposed portions of the estate under the will and not as her heirs.

A testator, after making provision for certain relatives, and giving the use of the estate in question to his wife during her life, disposed of the residue of his estate in these words: "All the rest and residue of my estates both real and personal I give and bequeath to my two brothers, A. and B., whom I appoint my executors, with

pointment, but the gift is by implication *from the direc- [*175]
 tion containing the power, the Court exercises no discretion, but distributes the fund equally^(u). In *Longmore v. Broom*, Sir W. Grant held clearly that the executors had a discretion, and might say to whom the fund should be given, the parents or the children. But the Court had not that discretion, but had only to say what class was to take, and then the distribution must be equal between the parents and the children.

(u) *Kemp v. Kemp*, 5 Ves. jun. 849; *Longmore v. Broom*, 7 Ves. jun. 124; and see *Gibson v. Kinven*, 1 Vern. 66.

full confidence that they will dispose of such residue among our brothers and sisters and their children, as they shall judge shall be most in need of the same; this is to be done according to the best of their discretion." A bill in equity was filed to determine the right of the various parties claiming under the will, and it was held, that a trust had been created by the will in favour of the brothers and sisters and their children, A. and B. and their children, being excluded therefrom; so that the estate vested in A. and B. as trustees for the brothers and sisters and their children, to be enjoyed after the death of the widow, and consequently that afterborn children and those who became needy thereafter, could not take; and that the trust was not void by reason of the uncertainty of the persons for whose benefit it was created. *Bull v. Bull*, 8 Conn. 47. The court also in this case, the executors having died without an appointment, directed a reference, to determine who were the most needy. *Harrison v. Harrison*, 2 Leigh, 1. Hill on Trustees, 57, note to 2d ed. by Wheeler.

[*176]

*CHAPTER XI.

OF RELIEF AGAINST THE ACTUAL EXECUTIONS OF POWERS.

SECTION I.

OF VOID EXECUTIONS BY THE GENERAL RULE OF LAW.

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| 2. Deed executing a power void upon same grounds as deeds in general. | 7. Contra where præmium pudicitæ. |
| 3. As by rasure. | 9. Duress avoids the deed. |
| 4. Not by cancellation. | 10. Drunkenness also. |
| 5. Void where consideration bad, as stifling a prosecution. | 11. Lunacy also. |
| 6. So where an inducement to prostitution. | 12. So where the whole transaction is a fraud. |
| | 13. Mere question of valid execution to be tried at law. |

1. In the last chapter we considered in what cases a *defective* execution of a power would be supported, and we are now to inquire in what instances the *actual* execution of a power may be set aside, although the solemnities required by the deed creating the power have been duly adhered to. This our present inquiry may be divided into two branches: 1. Where the instrument may be avoided at law. 2. Where equity only can relieve.

2. And first, an instrument executed under a power may be avoided at law on the same grounds as deeds in general may. To enter into the consideration of all the rules on this head would be an unpardonable digression: but their leading features, with reference to cases likely to arise upon the execution of [*177] powers, may, perhaps, without impropriety, be here stated. They form a link in the chain of our subject.

3. If, then, an instrument be altered by rasure or otherwise, in a material part, by the person for whose benefit it was intended, the deed becomes absolutely void. (a) The opinion formerly was

(a) Whelpdale's case, 5 Rep. 119 a.

that a rasure by a *stranger* would have the same operation : (b) but it hath lately been very properly decided otherwise : (c) for it should seem that the true ground of the rule is the fraud of the party interested.

4. And since the Statute of Frauds (d) the mere cancellation of an instrument will not defeat the estate created by it : (e) and even if the instrument would from its nature be revocable by cancellation, yet if the cancellation be made through a mistake in facts, or even, it is said, through a *mistake in law*, the mistake will annul the cancellation. (f)

5. If a power be executed as a consideration for stifling a prosecution for perjury, the execution is merely void : *non est factum* may be pleaded to the deed at law, and the special matter given in evidence : (g) although the opinion formerly was, that equity only could relieve where the consideration did not appear on the face of the deed.

6. So an execution of a power, as an inducement to a woman to live with the party in a state of prostitution, is void. (h)

7. But where it is a compensation for the loss of virtue after cohabitation, or, as it is termed, *præmium pudicitie*, the consideration is good, and the deed cannot be [*178] avoided. (i) (1) although the man was married at the time of the cohabitation, and the woman was aware of this fact. (k) unless, according, as it should seem, to Lord Hardwicke's

(b) Pigot's case, 11 Rep. 27 a.

(c) *Hudfon v. Brouley*, 6 East 210. See *French v. Patton*, 9 East, 351.

(d) 29 Car. II. c. 3, s. 3.

(e) *McGeonis v. McCullough*, Gilb. Eq. Rep. 225; *Roe v. Archbishop of York*, 6 East, 86; and see *Loach v. Loach*, 2 Ch. Rep. 52, which was before the statute.

(f) *Perrott v. Perrott*, 14 East, 423; *sed qu.*

(g) *Collins v. Blanton*, 2 Wils. 347; and see *Edgecombe v. Rodd*, 5 East, 294.

(h) *Walker v. Perkins*, 3 Burr. 1568.

(i) *Marchioness of Anandale v. Harris*, 2 P. Wms. 432; *Turner v. Vaughan*, 2 Wils. 339; *Hill v. Spencer*, Amb. 641.

(k) *Priest v. Parrot*, 2 Ves. 160; and see *Lady Cox's case*, 3 P. Wms. 240; *Knye v. Moore*, 1 Sim. & Sim. 64; S. C. 6 Barn. & Cress. 133, *nam.* *Nye v. Moseley*; 9 Dowl. & Ry. 165.

(1) *Burr v. Woodrop*, 1 Johns. Ch. R. 223, 227, 238. 2 Story's Eq. Jur. § 793 a, 793 b, and notes. *Horton v. Gibson*, 4 S. Car. Eq. Rep. 139. *Gardner v. Hoyer*, 2 Paige's Ch. R. 11. *Pratt v. Flower*, 5 Barn. & Johns. R. 10. *Minurn v. Seymour*, 4 Johns. Ch. R. 609. 2 *Wilkes's Ex'rs*, 804, 2d Am. Ed. *Shearman v. Angel*, 1 Bailey Eq. R. 351; 2 Kent's Com. 217, 5th ed.

opinion, the woman was previous to the intimacy, a prostitute ;(*l*) but in a later case, Lord Camden held clearly that there was no principle, even in equity, which says a man may not make a voluntary provision for a common prostitute, and he made a decision accordingly, in a case, the circumstances of which were well calculated to put the rule to the test :(*m*) and Lord Camden's opinion has been confirmed by a decision of the Court of Exchequer.(*n*)

8. And in like manner the deed may be avoided whenever the consideration for executing it is such as the policy of the common law rejects, or as the statute law forbids.

9. If the deed be executed under duress, it is voidable, but not actually void ; consequently the party may avoid it by special pleading, but cannot plead *non est factum*, and give the special matter in evidence.(*o*)

10. There are only two other cases which I shall here notice—drunkenness and lunacy. As to drunkenness, the distinction seems to be, that the instrument cannot be relieved against, unless the party was drawn in to drink through the management or contrivance of him who gained the deed.(*p*) in which case the deed is absolutely void, both in law and in equity, and consequently *non est factum* may be pleaded to it at law, and the drunkenness by the fraud of the plaintiff may be given in evidence.(*q*)(1)

(*l*) See *Clarke v. Periam*, 2 Atk. 333. 337.

(*m*) *Hill v. Spencer*, Amb. 641.

(*n*) *Gray v. Mathias*, 5 Ves. jun. 287.

(*o*) See *Bull. N. P.* 172.

(*p*) *Johnson v. Mellicott*, 3 P. Wms. 131, n., which is opposed to *Pitt v. Smith*, 3 Camp. Ca. 35; *Fenton v. Holloway*, 1 Stark. 126. See *Butler v. Mulvihill*, 1 Bligh, 137; *Nagle v. Baylor*, 3 Dru. & War. 60.

(*q*) *Cole v. Robbins*, *Bull. N. P.* 172.

(1) See *Rutherford v. Ruff*, 4 Desauss. Ch. R. 346, Per Desaussure, Ch. Arnold v. Hickman, 6 Munt. R. 15, pl. 1. *Campbell, et al. v. Ketchum, et al.*, 1 Bibb's Rep. 406. *Curtis v. Bell*, 1 South. N. J. Rep. 261. Where also the state of intoxication is so extreme as to deprive a man of his reason, it would invalidate any deed obtained from him while in that state. *Wale, et al. v. Colvert*, 2 S. Car. Const. Rep. 27. *King's Ex'rs v. Bryant's Ex'rs*, Hayw. Rep. 394.

“To set aside any act or contract on account of drunkenness it is not sufficient that the party is under undue excitement from liquor. It must rise to that degree, which may be called excessive drunkenness, where the party is utterly deprived of the use of his reason and understanding; for in such a case there can in no just sense, be said to be a serious and deliberate consent on his part; and without this, no contract or other act can, or ought to be binding, by the law of nature. If there be not that

11. As to lunacy, although the deed may be set aside by *the committee of the lunatic, or by his heirs after [*179] his death; yet it is incontrovertibly established that the party himself cannot, after he has recovered his senses, plead his lunacy in avoidance of the deed.(r) But a distinction has been established by the case of *Yates v. Boen*,(s) which does not appear to have been attended to by writers on this subject, although they refer to the case. To debt upon articles the defendant pleaded *non est factum*, and upon the trial offered to give the lunacy in evidence. The Chief Justice thought it ought not to be admitted, upon the rule in *Beverley's case*, that a man shall not stultify himself; but on the authority of *Smith v. Carr*, 5th July 1728, where Chief Baron Pengelly in the like case admitted it, and on considering the case of *Thompson v. Leach*, the Chief Justice permitted it to be given in evidence, and the

(r) *Beverley's case*, 4 Rep. 123 b; *Stroud v. Marshall*, Cro. Eliz. 328; *Murley v. Sherren*, 8 Adol. & Ell. 754. As to actions of assumpsit, see *Brown v. Joddrell*, 1 Mood. & Malk. 105; 3 Carr. & Payne, 30.

(s) *Yates v. Boen*, 2 Str. 1104.

excessive degree of drunkenness, then courts of equity will not interfere at all, unless there has been some contrivance or management to draw the party in to drink, or some unfair advantage taken of his intoxication, to obtain an unreasonable bargain or benefit from him." 1 Story's Eq. Jur. § 231. See *Barrett v. Baxton*, 2 Aiken's R. 167. *Burroughs v. Rickman*, 1 Green's N. J. Rep. 232. A court of chancery will not enforce the performance of an agreement entered into with a man in a state of intoxication, although the party insisting on the performance did not contribute to make him intoxicated. The Court will not assist either party in such a case. *Wilnuil v. Morgan*, N. J. Chancery, March T. 1827, opinion of Williamson, Ch. 1 Halsted's Dig. tit. Intoxication. *Rodman v. Zilley*, 1 Saxton's N. J. Ch Rep. 320. *Crane v. Conklin*, 1 Id. 346. *Clark v. Caldwell*, 6 Watts's R. 139. *Steel v. Young*, 4 Id. 459. *Taylor v. Patrick*, 1 Bibb's Rep. 168. *Reinicker v. Smith*, 2 Harr. & Johns. R. 423. *Williams v. Inabuel*, 1 Bailey's S. C. Rep. 343. *Reynolds v. Waller's Heir*, 1 Wash. (Va.) Rep. 207. *Peyton v. Rawlins*, 1 Hayw. R. 77. *Wigglesworth v. Steers*, 1 Hen. & Munf. R. 70. *Dorr v. Munsell*, 13 Johns. R. 430. *Seymour v. Delaney*, 3 Cow. R. 445. *White v. Cox*, 3 Hayw. R. 82. *Foot v. Tewksbury*, 2 Verm. R. 97. *Prentice v. Achorn*, 2 Paige Ch. R. 30. *Harrison v. Lemon*, 3 Blackf. (Ind.) Rep. 51. *Hotchkiss v. Fortson*, 7 Yerger's R. 67. *Gore v. Gibson*, 13 Mees. & Welsby's R. 623; S. C. 9 (Lond.) Jur. 140, and Jurist Reporters, (Wm. M. Best, Esq. of Gray's Inn,) note p. 142, where the continental authorities will be found collected and digested.

It is perhaps, not unworthy of remark, that the case of *Gore v. Gibson* was decided on the authority of the cases found collected in 2 Kent's Com. 451. See the opinion of Ch. Baron Pollock.

plaintiff upon the evidence became non-suit. Now the history of the revolution in this branch of law is this: When Beverley's case was decided, it was holden that deeds executed by lunatics were voidable only, but not actually void, and therefore they could only be set aside by special pleading, and by the rule of law the party could not stultify himself. And Mr. Justice Blackstone, following the old rule, has laid it down that deeds of lunatics are avoidable only, and not actually void.(1) But in *Thompson v. Leach*, this distinction was solemnly established, that a feoffment with livery of seisin by a lunatic because of the solemnity of the livery, was voidable only: but that a bargain and sale, or surrender, &c. was actually void.(2) This, therefore was the ground of the decision in *Yates v. Boen*. When the Chief Justice remembered that an innocent conveyance, or a deed by a lunatic, was merely void, he instantly said that *non est factum* [*180] might be pleaded to it, and the special matter given in evidence: and this applies strictly to deeds executing powers. But in the case of a feoffment with livery of seisin, the rigorous rule of law still prevails, and the party cannot stultify himself.(3) This is now altered by the 7 & 8 Vict. c. 76. s. 7, which enacts that no conveyance shall be voidable only when made by feoffment or other assurance, where the same would be absolutely void if made by release or grant.

12. Where a power with a condition, as in *Doe v. Martin*.(4) is complied with for form's sake, but in substance is departed from, and the whole transaction is founded in fraud, the execution will be a nullity at law as well as in equity. But such a case should not be confounded with those where, though there is no fraud, the execution is void at law because the power is not duly exercised.

13. Where the question is simply whether the power be well executed or not, as in the common case of a leasing power, the question must be tried at law, and if there is nothing more in the

(1) 2 Comm. 291.

(2) Comb. 438.

(3) 4 Term Rep. 39. Vide *infra*, ch. 18; *Doe v. Carr*, 1 Car. & Mars. 123.

(4) All the authorities may be found on this doctrine of the law in 1 Story's Eq. Jur. § 225 and notes.

case, a bill in equity to set aside the execution of the power cannot be maintained.(y)

*SECTION II.

[*181]

OF VOID EXECUTIONS IN EQUITY ONLY.

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| 1. Grounds for equitable jurisdiction. | 19. } Where he is safe: M ^c Queen v. Far- |
| 3. Trustee joining in appointment by misrepresentation, void. | 20. } quahar. |
| 4. Appointment to one child upon a bargain, void. | 22. Anger, &c. not a ground to impeach an appointment. |
| 5. Appointment of a jointure partly for husband's benefit, void. | 23. Davis v. Uphill. Where a parent having a power may take a benefit. |
| 6. So an advance of money by the husband to increase his power. | 24. Appointment to an infant for benefit of donee, bad. |
| 7. Jointures affected only pro tanto by fraud. | 25. Appointee with notice of agreement not to execute power, bound. |
| 9. Lord Hardwicke's opinion, the same rule applied to an appointment to a child. | 26. Where a purchaser under a power of sale is bound to see proper rents are reserved. |
| 10. { But the latter decided to be void in | 27. Appointment to a younger child void upon his becoming eldest. |
| 14. } toto. | 29. Marriage brokerage avoids an appointment. |
| 12. Distinction between the two powers. | 30. And the interest created will be set aside in toto for the remainderman. |
| 15. Son appointee, relieved as entitled in default of appointment, though particeps criminis. | |
| 18. Purchaser liable to the same equity. | |

1. THERE are some cases which a court of law cannot reach. This happens where the power is duly executed according to the terms of it; but there is some bargain behind, or some ill motive, which renders the execution fraudulent, and will enable equity to relieve. It were difficult to draw the precise line between the jurisdiction of law and equity on this head. The substantial grounds upon which equity maintains almost an exclusive jurisdiction in cases of fraud is, that it is enabled to mould and cut down the fraudulent instrument according to good conscience; whereas a court of law, if it take cognizance [*182] of the subject, must entirely defeat the instrument; it cannot maintain the execution, as far as it is within the meaning of the power, and set it aside so far only as it is a fraud on the

(y) *Tichburn v. Leigh*, 6 Vin. Abr. 365, pl. 11.

authority; but where the execution is altogether a fraud on the power, it may be asked, why, if you can once attack a deed executed under a power on the ground of fraud, may not that fraud be established at law as well as in equity? For this the case of *Collins v. Blantern*,^(z) is a strong authority. It is not impossible that it may be established, that whatever is a totally *fraudulent* execution of a power may be taken advantage of in either court. It has never been decided that a court of law cannot enter into the consideration of the fraud; and until *Collins v. Blantern* was decided, it was the general opinion that a court of law would not advert to a consideration unless it appeared on the face of the instrument. In the case of *Butcher v. Butcher*,^(a) a question arose, whether, under a power to appoint to children, equity could relieve against an appointment under which a share merely illusory was given to one child. The Master of the Rolls said, in terms, the power, though limited as to objects is discretionary as to shares. A court of law says, no object can be excluded; but there it stops. It does not attempt to correct any the extremest inequality in the distribution; and yet if that is a fraudulent execution of the power, why is it not void at law? A fraudulent act has no more validity in a court of law than in a court of equity: and if it is not a fraudulent execution, upon what principle does a court of equity deny it effect? It is sometimes said, this court interferes for the purpose of carrying into effect the intention of the party creating the power, who must have meant that each object should derive the same real benefit from the execution of the power. Now, every instrument must receive the [183] same construction from every court. Whatever is its true meaning must be its meaning every where. If then the true meaning of the power, however discretionary in terms, be, that each object shall have what is called a substantial share, it is not executed according to its true meaning, and therefore it is not well executed by an appointment that does not give to each object a substantial share. A court of equity may, in the exercise of its own particular jurisdiction, supply defects in the execution of a power. But he could not well understand how the question whether a power is well or ill executed, could receive different

(z) *Collins v. Blantern*, 2 Wils. 347.

(a) *Butcher v. Butcher*, 9 Ves. jun. 383; vnd see 1 Burr. 125.

determinations in different courts. If it is not executed according to its true import, how can a court of law say it is well executed ; and if it is executed according to its true import, how can a court of equity say it is ill executed.(I)

2. Upon questions like that in the last case, the jurisdiction exercised by equity is infinitely more strong than the common relief in case of fraud. If a man, having a power to appoint to A. or B., appoint to A., in consideration of a sum paid by him, equity will relieve against the fraud, and the courts of law would refuse to interfere, on the ground that they have not the same means of enforcing the discovery of fraud, and of relieving against it. But where, as in *Butcher v. Butcher*, a man has a power over a fund, which it is admitted will at law enable him to give any share, however trifling to one party, and he *without fraud* exercise that power accordingly, equity, by interposing its authority, actually puts a different construction on the instrument to what it must receive in a court of law ; and yet if a power gives a clear right to appoint to several persons, or any of them exclusively of the others, equity can grant no relief against the *bonâ fide* exercise of it in favour of some of the objects, excluding the others. But however strange *this doctrine may [*184] seem, it was well established that where the power did not authorize an exclusive appointment, equity would relieve against any appointment of an illusory share, although this relief can no longer be administered.(b)

3. I now proceed to state the cases of fraud in which equity has relieved : where a father, having an exclusive power of appointing to children with the consent of a trustee, prevailed on the trustee to join in appointing the estate to the youngest son, by representing the eldest as undutiful and extravagant, upon a bill by the eldest son to set aside the appointment, it was decreed accordingly, upon proof of the plaintiff being dutiful, and not extravagant, and that the father had misrepresented him ; and although the trustee's evidence was admitted, yet Lord Hardwicke refused to admit the father's evidence to prove the plaintiff's undutifulness and extravagance. The power was treated as a

(b) Vide *supra*, ch. 7, s. 6.

(I) The rule of equity, as we have seen, has been altered, but the text is preserved for the purpose for which it was introduced—the general reasoning.

trust to be executed with discretion : and the father being charged with a breach of trust, could not be allowed himself to prove the undutifulness and extravagancy of his son, upon which the cause depended.(c)(I)

4. So if a parent having a power to appoint the estate unto any of his children, exclusively of the others, appoint to one, upon a bargain made beforehand with that child, that he shall pay a consideration for it, equity will relieve against the appointment.(d)

5. Again, if a person having a power of jointuring, execute it in favour of his wife, but it is agreed between the [*185] parties that the wife shall receive part only of the jointure for her own benefit, and that the residue shall be applied for the husband's benefit, equity will set aside the execution of the power so far as it is in favour of the husband himself, on the ground of its being a fraud on the power and those creating it.(II.) And no confirmation by the wife after the death of the husband will avail ; the ground of relief is the fraud on the remainder-man.(e)

(c) *Scroggs v. Scroggs*, Ambler, 272; App. No. 8; the facts stated from Reg. Lib.

(d) See 1 vol. Ca. & Opin. 34; and see 1 Ves. jun. 310; *Tucker v. Tucker*, *Tucker v. Sanger*, 13 Price, 607; *McClell*, 424.

(e) *Lane v. Page*, Ambler, 233.—Note, this was a case of rank fraud. See Appen No. 26; the facts stated from Reg. Lib. *Aleyn v. Belchier*, Reg. Lib. A. 1757, fol. 432. (B.); App. No. 27, 1 Eden, 132. See *Daubeny v. Cockburn*, 1 Mer. 626.

(I) In this case, the reporter says, that *Sir Geo. Downing v. Bagnal*, 6th and 7th July, 1753, was cited for the plaintiff. The case, however, does not relate to the question, and must have been cited merely to show the effect of concealment. The case is in Reg. Lib. A. 1775, fol. 95. The facts in the Register's book led me to discover that the case is reported by Ambler himself, by the name of *Downing v. Townsend*, 280. 592.(1)

(II) The late Mr. Justice Ashurst, when at the bar, said, *arguendo*, "Fraud, particularly in the case of powers, is cognizable in a court of law; *Lane v. Page*, T. 27 Geo. 2, B. R. A power given for one purpose shall not be exercised for another, though within the letter of the power." 1 Blackst. 619. If the Court of King's Bench held the execution bad in *Lane v. Page*, that case would be an important authority with reference to the doctrine discussed at the opening of this section. No notice is taken in Reg. Lib. of any proceedings having been had at law; and from the circumstances of the plaintiff at law having also been plaintiff in equity, it would seem that he did not prevail at law. I have searched for the case in the King's Bench without success.

(1) See *Drum v. Lessee of Simpson*, 6 Binn. R. 478, where the trustee was admitted. "The case of *Scroggs v. Scroggs*, Ambler's R. 272, bears a strong resemblance to the present." Per *Tilghman*, Ch. J., p. 432.

6. So if there is a power to make a jointure under restrictions, as 100*l.* a year for every 1,000*l.*, and the husband himself advance a sum of money in order colourably to enable him to make the larger jointure, the Court will reject such part as is more than proportional to the real fortune.(*f*) But in these cases equity will not set aside the whole settlement, but merely that part which is infected with fraud.(*g*)

7. In *Lane v. Page* the jointure was made before marriage, but upon the corrupt agreement for the benefit of the husband: the woman was of age, and acted for herself; but still Lord Hardwicke supported the jointure to the extent of the absolute provision for her, although he rejected "a surplus [*186] provision for her after payment of the husband's debts.

He said that fraud will affect only so far as it extends, and equity will not say that particeps criminis shall have no benefit of the agreement in any part. So in the case put, of a power to make a jointure under restrictions, the fraud shall not run through the whole, but the execution shall be good for so much as is proportionable to her fortune. In *Aleyn v. Belchier* the power was executed, and the fraudulent agreement made subsequently to the marriage; and although the remainder-man, by his bill, submitted to pay the jointure which the wife was really to have, so that the point did not call for a decision, yet Lord Northington treated the case as if it was similar to *Lane v. Page*; and the submission shows the impression of the Bar.

8. And in a case where, after marriage, the husband executed the power of jointuring in his wife's favour upon an agreement with her, and a creditor of his, that she should grant out of her own estate to the creditor an annuity for her life equal to the jointure, to become payable on her death, the execution of the power was supported.(*h*)

9. But a power of jointuring is distinguishable from a power of appointing to children. In delivering judgment in *Lane v. Page*, Lord Hardwicke observed, that he was not clear that (as argued

(*f*) See *Ambl.* 235. 239.

(*g*) *Lane v. Page*, *Aleyn v. Belchier*, *ubi sup.*; *Palmer v. Wheeler*, 2 *Ball. & Beatty*, 18.

(*h*) *Baldwin v. Roche*, 5 *Ir. Eq. Rep.* 110.

by plaintiff's counsel) where there is a power of appointment to children, and part is appointed fraudulently, the whole appointment is void. He could not say it was so. *(i)* According to another report, *(k)* his expressions were: One case put he was not clear in. If a man having a power to appoint 10,000*l.* among children, appoints 8,000*l.* to one child on agreement to take back 2,000*l.*, it would not be good for the 6,000*l.* He knew of no case

of that kind. In another passage in Ambler, where [167] he is putting examples of instruments being set aside only *pro tanto*, he added, so where fraudulent appointment amongst children. *(l)* In the other report, *(m)* the passage runs thus: As in appointments, not exceeding such a sum, amongst children, and he appoints certain sums, reserving a part to himself, it would not set aside the whole. Lord Hardwicke, therefore, appears to have thought that even in such a case the appointment would only be set aside to the extent of the fraud.

10. But in *Daubeny v. Cockburn*, *(n)* where the power was to appoint to all or such one or more of the children as the father, or settlor, should choose, and in default of appointment the fund was limited to the only son, his executors, &c.; and the father appointed a large sum to one of his daughters, upon a bargain beforehand with her for his benefit; it was held by Sir William Grant, that the appointment was void *in toto*. He said, that upon principle, and notwithstanding Lord Hardwicke's *dicta*, he did not see how any part of a fraudulent agreement can be supported, *except where some consideration has been given that cannot be restored*, and it has consequently become impossible to rescind the transaction *in toto*, and to replace the parties in the same situation. In the case of *Lane v. Page*, the subsequent marriage formed such a consideration on the part of the wife. In the case of *Aleyn v. Belchier*, where the appointment was subsequent to the marriage, it can hardly be said to have been decided that the appointment was good in any part. For the bill contained a submission to pay

(i) Ambl. 234.

(k) Ib. n. 4; de Grey's MSS. in Blunt's edit.

(l) Ambl. 235.

(m) Ib. n. 8.

(n) 1 Mer. 626.

the annuity to the wife, and only sought relief against the other objects of the appointment.

11. In ordinary cases of fraud, he observed, the whole transaction is undone, and the parties are restored to their original situation. If a partially valuable consideration has been given, its return is secured as the condition on which equity relieves against the fraud. But in such a case as the [188] present, the appointment of any particular proportion to any particular child is a purely voluntary act on the part of the parent, and although as good, if fairly made, as if the consideration were valuable, yet what is there that the Court can treat as a consideration which must be restored if a fraudulent appointment be set aside, or as incapable of restitution, and therefore support the appointment, so far as it is for the child's benefit. To say, It is to be supported to that extent, would be to say that the child shall have the full benefit of the fraudulent agreement. Either then you must hold that a child giving a consideration for an appointment in its favour is guilty of no fraud on the power, or you must wholly set aside the appointment procured by the fraud. Such a bargain is a fraud upon the other objects of the power, who might not, and in all probability would not, have been excluded but for this agreement. It is more particularly a fraud upon those who are entitled in default of appointment, for *non constat* that the father would have appointed at all if the child had not agreed to the proposed terms.

12. It seems clear, therefore, that Sir W. Grant, if unrestrained by authority, would have held such a jointure made after marriage altogether void in equity, unless the wife's coverture had been deemed a protection to her. The same principle would extend to *Lane v. Page*; for although the consideration of marriage was given after the execution of the power, and could not be recalled, yet the fraudulent agreement upon which the whole was founded was made before the marriage, and whilst the woman was free to withhold the consideration. Lord Hardwicke treated her as *particeps criminis*, but still held her entitled as far as the jointure was not to be fraudulently applied, and Lord Northington entertained the same opinion.

13. But the case before Sir William Grant is distinguishable from the former cases, the doctrine in which is not likely to be dis-

[*189] turbed. In the case of a jointuring power the wife is the *only* object, and equity adopts a just rule when it allows the appointment to stand as far as it is within the power. But in the case of a power to appoint to children, there are other objects, and one who obtains an appointment upon a fraudulent agreement ought not to be permitted to retain it against the other objects who have been guilty of no fraud, and would have taken in default of appointment equally with the appointee, if no fraudulent agreement had been entered into. In *Daubeny v. Cockburn* the son was one of the objects of the power, and he took the whole of the fund in default of appointment. Sir William Grant refers to the above ground. Such a bargain, he says, is a fraud on the other objects of the power. But he adds, that it is more particularly a fraud upon those who are entitled in default of appointment. Now this latter ground of course applies to a power of jointuring as well as to a power of appointing to children, for *non constat* that the husband would have appointed at all to the wife, had she not agreed to the proposed terms. To this view, however, the judgment of Lord Hardwicke, and the opinion of Lord Northingham are opposed. The husband *has* appointed, and had a right to do so. There is no contest between the wife and other objects of the power. You cannot know that he would not have partially provided for his wife without reference to the fraudulent agreement. As far, therefore, as he *has provided for her*, the appointment is allowed to stand. This is no fraud upon the remainder-man. But as far as the wife is really not to benefit, a burden is improperly imposed upon the remainder-man, and so far he is properly relieved against the jointure.

14. The point *decided* in *Daubeny v. Cockburn*, viz. that a fraudulent appointment to one of several objects of a power, is void *in toto*, when the appointee is a party to the fraud, came before the Court in the later case of *Farmer v. Martin*, (o) [*190] and the Vice-Chancellor set aside such an appointment, as proceeding upon a footing which in a court of equity is always held to vitiate the contract altogether.

15. In a recent case in Ireland, where, under an exclusive power, the estate was appointed to the eldest son, in order to procure him to join with his father in securing a debt of the

father's on the estate, which he accordingly did, and the equity of redemption was immediately relimited to the father for life, remainder to the son for life, remainder to his issue in strict settlement, remainder to other sons of the marriage, remainder to the father in fee. Lord Manners treated the whole transaction as a fraud on the power. The appointment in favour of the son was made for the purpose of enabling him to join in securing the father's debts upon the lands, and the creditors had clear notice of the fraud committed in the execution of the power. He therefore set aside the mortgage.(p)

16. In the above case, the estate, in default of appointment, was limited to the eldest son, his heirs and assigns: so that if no appointment had been made, he would have taken the estate. The father lived eight years after the appointment. The son died within a few months after his father, leaving an infant heir, by whom the bill was filed. It was objected, that the son, being *particeps criminis*, the plaintiff deriving through him, was not entitled to relief, and that length of time was also an objection to the relief prayed. But Lord Manners decided otherwise: he observed, that it was impossible to say that the son, acting under the influence of parental authority, and imposed upon as he had been by these several deeds, drawn in the same office, executed at the same time, and perfectly known to the mortgagees, had been guilty of any fraud towards them. The father, armed with parental authority, and possessing such a power over the property, had acquired an irresistible influence and dominion over the son, which he used and exerted to "procure [*191] these improvident deeds. Was not this oppression?

Was not this fraud? And had not the mortgagees notice of it? As to the acquiescence, what had the son but a reversion expectant on his father's life-estate? And during his father's life he was under the influence of the same authority, and could not be expected to take any step in assertion of his rights. Then had such a length of time elapsed as amounted to that degree of laches which should prevent the Court from interfering? It appeared that both father and son died in the same year, within a few months of one another: during the father's lifetime the son could

(p) *Pelton v. Wheeler*, 2 Ball & Beatty, 18. See *Davis v. Uphill*, 1 Swanstr. 120; *Rhodes v. Cook*, 2 Sim. & Sta. 488.

do nothing useful ; and his Lordship, therefore, could not say that the son was barred by acquiescence ; *a fortiori* length of time did not operate against the plaintiff, as yet a minor.

Now, in this case, the son, however innocently, was a party to the fraud, and yet, being the only remainder man, his son, claiming through him, was allowed to impeach the appointment, although, probably, that very appointment prevented one in favour of the *other* objects of the power.

17. Where an appointment was made to an object of the power, and he gave bonds to several other persons who were not objects of it, to secure to them sums of money ; that was considered as substantially and in effect an appointment for the benefit of the strangers, and the appointment was wholly set aside. (*q*)

In the above case, the settlement in which the power was contained was a voluntary one, and the persons to whom the bonds were given were included amongst the class for whom the settlor had *intended* to provide by the settlement ; but the Court, in a suit for ascertaining the rights of the parties under the appointment, refused to consider whether, in a suit properly framed, the settlement might not have been corrected.

18. In all these cases the same relief would be administered even against a purchaser, if he had notice of the [*192] fraud ; and even if he had not notice of the fraud, yet if he has not the legal estate, he cannot protect himself in equity. The payment of a money consideration cannot make a stranger become the object of a power created in favour of children. He can only claim under a valid appointment executed in favour of some one of the children. (*r*)

19. This is a point which daily arises in practice. The parent first sells the estate, and then executes an appointment to one child, in order to enable him to make a title : and in many instances purchasers are justly alarmed, lest, if there should be any underhand agreement, the transaction itself would be deemed notice of the fraud. But where the money is paid to the father and son, and there is nothing to show that the son was not to receive his due proportion of it, the purchaser may safely com-

(*q*) *Lee v. Fernie*, 1 Beav. 483.

(*r*) *Per Master of the Rolls*, 1 Mer. 638.

plete his contract, unless he actually has notice of some under-hand agreement.

20. This was decided in the late case of *M'Queen v. Farquhar*,^(s) where under an exclusive power of appointment, a father appointed to one son in fee, and then the father, and his wife and the son, joined in conveying to a purchaser, and the money was expressed to be paid to them all. The title was objected to on the ground of an opinion, by which it appeared, that the father first sold the estate, and then the appointment was devised to make a title, and the purchase-deed recited that the contract was made with the father and son. It was insisted, that if the father derived any benefit from the agreement, or even made a previous stipulation that his son should join him in a sale, which there appeared the strongest reason to apprehend, it would have been a fraudulent execution. But Lord Eldon overruled the objection, as it did not appear that the estate sold for less than its value, or that the son got less than the value *of [*193] his reversionary interest, but merely that he, as the owner of the reversion, acceded to the purchase.

21. So an antecedent bargain between the father and child, that if the appointment were made the fund should be lent to the father, although on good security, has been held sufficient to vitiate the appointment.^(t)

Where fraud does not exist, any violence of feeling, anger, resentment, cannot be adverted to: for as Lord Redesdale observed,^(u) it would not be safe to advert to them. There would be no end of such objections, if they were to be admitted as grounds for questioning appointments: in almost all [or rather in many of] these cases, where there has been an inequality in the appointment, something of that kind has existed.

23. In *Davis v. Uphill*,^(x) a woman who had survived her husband was tenant for life of the estate, with a power to appoint the remainder to the children, who in default of appointment

(s) *M'Queen v. Farquhar*, 11 Ves. jun. 467. See *Doe v. Jackson*, 1 Mood. & Rob. 553; *Jackson v. Jackson*, 7 Cl. and Fin. 977; *Campbell v. Horne*, 1 You. & Coll. C. C. 664.

(t) *Arnold v. Hardwicke*, 7 Sim. 343.

(u) *Vane v. Lord Duncannon*, 2 Scho. & Lef. 130, 131. See *Supple v. Lowson*, Anbl. 729.

(x) 1 Swanst. 129.

took the estate under the settlement, and by arrangements with all the children she appointed the estates amongst them, and it seems gave up possession of part, and the remainder was limited to her for life *without impeachment of waste*, and a recovery was suffered to make good the arrangement. It was insisted that this was a benefit obtained as the condition of an execution of the power, and therefore void in equity. Lord Eldon thought, that even if the final arrangement could be considered only as an execution of her power, there was considerable reason for contending that the arrangement might be supported. If the title was to stand upon the recovery she enabled them to suffer, and not execution of power, there seemed no valid objection in equity to her bargaining as to the terms on which she would join in a recovery; and indeed the same observation might apply if it was [414] to be considered as a mixed transaction of execution of power and recovery, as it seemed to him that if her joining in a recovery was required by the family to ascertain their own rights, she might be allowed to judge on what terms she would join. He had not met with any case where in an arrangement settling the interests of all the branches of a family, it had been held that children may not contract with each other to give to a parent who had a power to distribute property among them, some advantage which the parent without their contract with each other could not have.

24. And here we may refer to the rule, that a parent having a power to fix the time when portions are to be raised, cannot appoint an immediate portion to an infant not in want of it, with a view to become entitled to it himself, as her personal representative, in case of her death.(y)

25. Where a party taking under a power, has notice of an agreement for valuable consideration not to execute the power, or of what is tantamount to such an agreement, equity will relieve against the execution. Thus, in the case of *Scrope v. Offley*,(z)(1) a tenant for life with a power of jointuring, conveyed the estate

(y) 1 Bro. C. C. 395; 11 Ves. jun. 473; 1 Russ. & Myl. 436. As to the general rule, vide *infra*.

(z) 4 Bro. P. C. 237. See 2 Atk. 567; 2 Burr. 1145.

(1) In *Barnard's Rep. Cha.* 112, it is said that the covenant in this case was construed to be a release. But however this may be the principle in the text is clear.

on his marriage, as if he were seised in fee, and covenanted against incumbrances done or *to be done*. He afterwards married a second wife, and after marriage limited a jointure to her by virtue of his power, *she having notice of the first settlement*: and Lord Chancellor King relieved against the execution of the power, at the suit of the issue of the first marriage, and his decree was affirmed in the House of Lords.

*26. In the case in Ireland, (a) the L. C. in discuss- [*195] ing the right to set aside void leases granted under a power, observed, that he did not touch a case of this sort—a void lease by a tenant for life under a power at an inadequate rent, and then a sale of the estate under a power of sale in the same settlement, at a price in proportion to the rent reserved: in such a case there was nothing to affect the right of the remainder-man to set aside not only the lease but the sale. The purchaser knew that there were leases, and ought to have ascertained the terms of them, and not to have paid his money for the estate without doing so. This observation was made in a case where the inadequacy of rent was apparent, and it must be confined, to such a case, for certainly a purchaser under a settlement cannot be required to see that the best rent was reserved upon every lease of the estate.

27. But the most remarkable instance of the interference of equity remains to be stated, although it is properly a case of construction. The precedent was established by Lord Keeper Wright, in the case of Chadwick v. Doleman. (b) A power was given to a parent, tenant for life, to appoint a sum of money for younger children's portions, to be raised after his death, which in default of appointment was to be equally divided amongst them, and the estate itself was settled on the *first* and other sons in tail. There being several younger children of age, the father appointed the money amongst them, and gave a particular sum to his *second* son, who was of age, and under a treaty of marriage. The son afterwards became eldest son, and as such entitled to the estate itself, and thereupon the father made a new appointment of the portion given to him. The Lord Keeper admitted that the sec-

(a) Muskerry v. Chinnery, Llo. & Goo. Rep. t. Sugd. 218, 219.

(b) 2 Vern. 528. See Driver v. Frank, 3 Mau. & Selw. 25; Windham v. Graham, 1 Russ. 331.

and son, at the time of the appointment, was a person capable to take, and was a younger child within the power [*196] of appointing; but was of opinion that this was a defeasible appointment (as he was pleased to term (I) it,) not from any power of revoking, or upon the words of the appointment, but from the capacity of the person. He was a person capable to take at the time of the appointment made, but that was *sub modo*, and upon a tacit or implied condition that he should not afterwards happen to become the eldest son and heir: so that he had, as it were, only a defeasible capacity in him: and he decreed accordingly. He added, that although the appointment had been made in consideration of marriage, it would have been the same thing.

28. Lord Talbot appears to have approved of the foregoing decisions: (c) and in a case before Lord Hardwicke, (d) he entirely adopted it. He said, that Lord Cowper [*qu. Wright*] went plainly on this: he (Lord Cowper) found it established by the precedents and authorities of this Court, that the words, "younger children" had received a prodigious latitude of construction to answer the occasions of families and intent of the parties, often construing an eldest daughter to be a younger child, that is, carrying the words very much out of the natural, into a foreign and remote sense, to answer the intent: and he found it determined, that an only daughter though not younger in comparison than another, should be considered as a younger child where a provision was made for the younger children, and no other provision, and the estate limited to go over: and there have been cases where a younger son becoming an eldest, under certain circumstances, has been considered as an eldest, to exclude him from the benefit of the portion: and therefore the rule laid down [*197] by Lord Hardcourt, in *Beal v. Beal*, (e) has been, "that younger children shall be considered such as do not take the estate, are not the head and representative of the family: Lord Cowper having found this, from thence inferred a tacit con-

(c) See *Jermyn v. Fellows*, For. 93.

(d) *Teynham v. Webb*, 2 Ves. 198.

(e) 1 P. Wms. 451.

(I) This is the expression of Vernon, the Reporter, from which it should seem that he did not approve of the decision.

dition, that the capacity of being a younger son should continue until the time of payment came, and therefore made that determination, though the father had actually executed his power. Taking it *in abstracto*, merely as an execution of a power, it could not possibly be maintained upon the general rules; but the ground Lord Cowper went on was, that the continuing of the capacity to the time of the provision taking effect in point of payment, was a tacit or implied condition going along with the appointment.

29. Lastly, if a power be exercised in consideration of the appointee procuring a marriage between the person executing the power and another person, the execution will be set aside. (*f*)

30. And in such a case, the representatives of the tenant for life are not permitted to avail themselves after his death of the interest created, but it will be wholly set aside for the remainder-man. Thus in *Stribblehill v. Brett*, the party who married was tenant for life, with remainder to his son in strict settlement, and had a power of leasing at an old rent, and *the lease actually granted* was for ninety-nine years determinable upon lives, at a rent of 5*l.*, and for a consideration expressed of 3,650*l.*, but the consideration really was the procuring of the marriage. The bill was filed by a lessee who claimed under the remainder-man after the decease of the tenant for life without issue; and it was insisted that he was not entitled to controvert the lease, for he did not claim under or in privity to the lessor, who was but tenant for life, but under a remainder-man, and that if *the lease* was a trust, it would belong to the executor of the ten- [*198]
ant for life: but the lease was ordered by the Lords to be delivered up to be cancelled. But this relief is confined to equity, and it must be admitted that originally it was a question of nicety, whether as the tenant for life had actually granted the lease, and had power to do so without any consideration, the effect of the illegal consideration ought not to have been to vest the interest in himself.

(*f*) *Stribblehill v. Brett*, Prec. Cha. 165; 2 Vern. 445, reverse in Dom. Proc.; 4 Bro. P. C. 144, Toml. ed. nom. *Scribblehill v. Brett*. See 1 Fonbl. book 1, ch. 4, s. 10, and notes; *Williamson v. Gihon*, 2 Scho. & Lef. 357.

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*CHAPTER XII.

HOW ESTATES GO IN DEFAULT OF OR WHERE THERE IS A BAD
APPOINTMENT.

SECTION I.

OF LIMITATIONS IN DEFAULT OF APPOINTMENT.

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| 1. Estates in default of appointment, vested. | 23. Folkes v. Western: effect of advancement. |
| 2. Gifts by implication in default of appointment. | 24. Pitt v. Jackson, contra. |
| 3. Gifts accelerated where power void. | 25. } Observations on the cases. |
| 5. General power and general gift in default of appointment, restrained by intention. | 26. } |
| 6. "In default <i>thereof</i> ," where it refers to appointment. | 28. Operation of common clause in settlements as to advancements. |
| 7. In default of joint appointment, a power to survivor, whether both can be exercised. | 29. } Noel v. Lord Walsingham. |
| 10. Separate gifts including the same objects. | 30. } |
| 11. Fund vested at twenty-one, yet prior power remains. | 31. Father may keep portion on foot upon advancement. |
| 12. Of appointments to surviving children, with reference to vested interests. | 32. Duke of Bridgewater v. Egerton. |
| 13. } Amongst, creates a tenancy in common in a gift from a power, by | 33. } |
| 21. } implication. | 34. } Where appointment is in full of share. |
| 14. } Issue of a child, although objects of a power, may only take by substitution if no appointment. | 35. } |
| 18. } | 36. A donee of a power may take under a general description, in default of appointment. |
| 17. Longmore v. Broom. | 37. Gift to one for life with a power; in default to executors, &c., property. |
| 19. Then, where an adverb of relation. | 38. Part badly appointed goes as in default of appointment. |
| 20. Power and gift over confined to the same to objects on a contingency. | 40. Power not controlled by gift in default of appointment. |
| | 41. Where a power is confined to a default of previous limitation. |
| | 42. Mistake in settlement corrected: in default of appointment instead of issue. |

1. We have already had occasion to consider the effect of the creation of a power on the estates limited in default of

*appointment,(a) and we have seen that whether the [*200] estate be real or personal, and whether the power be merely to distribute and fix the shares, or to select and exclude any of the objects of a class, and whether the power be general or special, the limitations in default of appointment are vested, subject to be divested by the exercise of the power, but that such a power will prevent the parties from being entitled to a transfer of the property, although they do take vested interests.

2. We have also had occasion to consider in what cases the objects take in default of appointment, although there is no express substantive gift to them in that event,(b) and we have seen that, speaking generally, where the fund is *in esse*, and the intent is to provide for the objects of the power, a power to appoint the fund amongst them is in the nature of a trust, which ought to be executed, and therefore amounts by implication to a gift of the fund to the objects of the power, in default of its being appointed to them.

3. So we have seen the effect of an appointment in taking a fund wholly out of the settlement,(c) and have considered the cases where powers, either original(d) or delegated,(e) which happen to be void in their creation do not defeat, but accelerate the gifts in default of appointment.

4. It will in this Chapter, therefore, only be necessary to state, 1. A few cases which have arisen on particular limitations in default of appointment, and 2. To show how estates go where there is a bad appointment. As to the former :

5. A general power of appointment may be cut down to particular objects by reason of a gift over to them in default of appointment;(f) and by parity of reason; a general gift over in default of appointment may, in favour of the intention,

*be restrained to the objects to whom an appointment [*201] might have been made.(g)

(a) Vide *supra*, ch. 8, sect. 1.

(b) Vide *supra*, ch. 10, sect. 6.

(c) *Supra*, p. 20.

(d) *Supra*, p. 2.

(e) *Supra*, p. 67.

(f) Vide *supra*, vol. 1, p. 530.

(g) Vide *supra*, vol. 1, p. 541.

6. In *Pritchard v. Quinchant*, and *Jenkins v. Quinchant*,^(h) the wife's estate was settled after marriage to such uses as the husband and wife should jointly appoint, and in default of appointment to themselves for life, remainder to the use of their children in such shares, &c., manner and form as the husband by deed or will should appoint, *and in default thereof*, to the husband in fee. Lord Hardwicke said, the only question was upon the words "in default thereof" of issue or appointment; if the latter, the issue are to take nothing if he makes no appointment. The plaintiff says the latter is an unreasonable and unnatural construction of the mother's intention. Upon the deed, which was *inter vivos* and of legal limitation, the words of it must prevail. He was much disinclined to do it, but he must be of opinion that it meant *in default of appointment*. If any estate had vested without appointment, he should have been of a different opinion; but there were none; it was only to the child he appoints. *Thereof* must refer to some act described before the appointment.

7. In *Simpson v. Paul*,⁽ⁱ⁾ as we have seen, where a fund was settled to be divided between the children in such shares and proportions as the husband and wife during their joint lives, or *in default thereof*, the survivor of them, should appoint, with a trust for the children equally in default of such appointment, and the father and mother appointed a third of the fund to a daughter upon her marriage as *her share* of the fund, Lord Northington held that the wife, as survivor, could not increase the share. He said the question depended on what was the intent of the parties creating a power, viz. whether after a partial execution by baron and feme of an original power, a secondary power, to [*202] arise in default of the execution of the original power, could have any effect; and he was of opinion, that a partial execution of an original power like the present, respecting the appointment of portions among children, would prevent the secondary power given to the survivor from taking place. He thought that as the husband and wife had taken up the execution of the joint power in part, they had thereby brought into life that power, on the deadness of which the other was to arise; not that

(h) Ambl. 147; 5 Ves. jun. 596, n. See *Doe v. Perryn*, 3 Term Rep. 484; *Rex v. Marquis of Stafford*, 7 East, 521.

(i) 2 Cox, 34, *supra*.

the husband meant to bind himself by this partial execution, so as to prevent a further joint execution if his children should require it. But that he considered it as the whole of that daughter's fortune, appeared by the expression, which was not her part, *but her share*, which showed he considered himself as executing his power of allotting the shares among his children, *and if no future allotment was made by him*, that the fund should be shared equally amongst his three children. He relied in proof of this upon expressions in the husband's will, and added, that it would be dangerous to say, when a father on the proposal of a daughter's marriage sees it necessary to exercise his power by allotting her her fortune or share, without going further as to the other children till a like occasion calls for it, *that he thereby leaves the remainder to be partially distributed by his widow*. It was unreasonable to suppose he intended it, and it was derogatory to the dignity of the marriage state to allow the wife to control the intent of her husband relating to a provision for his children. If it had been so intended it might have easily been so expressed, in default of appointment *of all or any part*, then, *as to what remained unappointed*, to be subject to the power of the survivor; but that not being the case here, the appointment was void.

8. Now the Court was not at liberty to look at the husband's will in order to ascertain what the intention was, nor to take into account the dignity of the marriage state. The simple question was, did the power to the survivor arise? [*203] The only judicial ground relied upon was, that the power to the survivor was not, in default of a joint appointment of all or any part, to the survivor to appoint what remained unappointed; but it seems to be clear that the law is otherwise, and that the words in question are included in the general terms, in default of such appointment, although where those words are introduced it may be strong to show, that not merely the legal effect of the power, but the intention of the settlors, was that there might be partial appointments. (k) Lord Northington indeed held, what at first is not very apparent, that by the partial exercise of the power in favour of one child, although the joint power might be further exercised, yet the power to the survivor was altogether at an end, for the wife appointed a much smaller portion to the sons

than to each of the two daughters, and the appointment was wholly set aside. This clearly cannot be maintained. If even the execution of the joint power prevented an exercise of the sole power in favour of the same object, yet as to the other objects the power must have remained unaffected over the residue of the fund.

9. The real question in the cause perhaps was, whether the joint appointment by the husband and wife to the daughter of a third as her share, and the release by the daughter and her husband, did not operate as a full execution in favour of that daughter so as to prevent either the husband or wife, as the survivor, from altering what both had solemnly settled under the first power. But this point depends not upon the question whether a partial joint appointment altogether prevents the sole power from rising, but upon the intent of the parties in jointly executing the first power, coupled in effect with a contract by the child advanced not to accept any more of the fund.

10. Of course although the objects of a prior gift may not live to take under it, yet if they answer the description of a class in the gift over, they will become entitled. Therefore, under [*204] *the common trusts in a settlement for the children to be vested at twenty-one, and in case none should attain that age, then in trust for the brothers, &c., of the wife, as she should appoint, and in default of appointment in trust for her next of kin; the children may take under the last limitation, although they all die under twenty-one.(l)

11. Where a power is given to a tenant for life to appoint to his children, and in default of appointment the fund is given to the children at a particular age, as at twenty-one, although it is expressly declared that if any child shall attain twenty-one in the life of its parent, his share shall be considered as a vested interest, subject to the life-estate, yet that provision will only relate to *unappointed shares*, and the power will not be defeated by the children attaining twenty-one before it is exercised; nor will it give them vested interests at that age in what may have been actually appointed to them.(m) This was decided by Lord Thurlow, and the point has always been considered as well de-

(l) *Withy v. Mangles*, 4 Beav. 358.

(m) *Boyle v. Bishop of Peterborough*, 1 Ves. jun. 299; and see particularly p. 309. *Butcher v. Butcher*, 1 Ves. & Bea. 79.

cided. In a late case before Lord Eldon the point was agitated, and he said that he would not disturb the case before Lord Thurlow: Lord Eldon said, that the question was, what is the law at this day, as to the due mode of executing a power of appointment by a parent among all the children, to be executed at any time up to the death of the parent, even by deed or will, where some of the children are dead before any appointment. After adverting to the doctrine, that an appointment cannot be made to a deceased child, or the representatives of a deceased child, he observed, that the mode of executing the *power* in the case of a deceased child, according to the old practice of conveyancers, that prevailed before the case of *Boyle v. The Bishop of Peterborough*, was by giving part to the surviving children, making no appointment of the residue, which therefore was permitted to go as in default of appointment. That, ['205] certainly, was very ill-conceived, and incorrect; the consequence was, that as in most cases the share unappointed would go among all who attained twenty-one, living and dead, as property vested in them at that age, or on marriage of daughters it would be divisible among a child surviving, and all those who were dead; but it is very difficult, almost impossible, to speak of that sort of device as an appointment. Lord Thurlow dissented from that which he (Lord Eldon) understood to have been the previous notion of conveyancers, and established the rule in that case of *Boyle v. The Bishop of Peterborough*.

12. The mode above alluded to was a mode of executing the *intention* through the medium of the power. It is, as we shall see, firmly settled, that unless there is a provision to the contrary, the unappointed part goes to all the objects under a gift in default of appointment, including those to whom part has been appointed. It is settled, that the donee may defeat the gift in default of appointment by appointing to a surviving child; but he may not wish to wholly defeat the gift over, and yet be desirous to make an inequality. Thus, under a common power to appoint to children, with a gift to them in default of appointment at twenty-one; suppose there to be three children, and two attain twenty-one, and then die, here, subject to the execution of the power, the personal representative of each of the deceased children is entitled to a third. The donee cannot increase the

share by an appointment, because the representatives are not objects of the power, but he may increase the share of the surviving child by appointing a portion to him, and of course leaving him to participate in the residue equally with the representatives of the deceased children. Where there is the usual provision that appointed shares shall be brought into hotch-pot, the donee may appoint to the surviving child more than his share upon an equal division: in which case, of course he will [*206] not claim any portion of the residue, but will suffer it to go to the representatives of the deceased children.

In one case an appointment was made to surviving children, with a proviso, that if any appointee claimed any part of the share unappointed, the appointed share should be brought into hotch-pot. (*n*)

13. We have seen that a mere power in words may imply an absolute gift to the objects in default of appointment. Where this is the case, and no appointment is made, it frequently becomes a question whether the objects take as tenants in common, or as joint tenants. In *Maddison v. Andrew*(*o*) the fund was to be disposed of *to and amongst* the testator's daughters as his wife should appoint. It was not necessary to decide the point: but Lord Hardwicke expressed his opinion that the bequest was joint. But in a case before Lord Rosslyn, where the devise was to A. in trust, to give, &c., the estate *unto and amongst* his children as he should appoint, he held it to be a tenancy in common: (*p*) and, in a similar case, Sir William Grant, Master of the Rolls, followed that case as an authority, (*q*) and decided accordingly.

14. In the case of *Routledge v. Dorril* there was a gift in default of appointment, to the children, grandchildren, or issue generally of the marriage, living at the decease of the survivor of the husband and wife, with a proviso, that in case of no appointment the issue of any child dead should not have a greater share than his parent, if living, would have been entitled to; and Lord Alvanley determined, that although the children of a living

(*n*) *Cunynghame v. Thurlow*, 1 Russ. & Myl. 436, n.

(*o*) 1 Ves. 57.

(*p*) *Reale v. Reale*, 5 Ves. jun. 744.

(*q*) *Casterton v. Sutherland*, 5 Ves. jun. 445; and see *Fowler v. Hunter*, 3 You. & Jerv. 506.

parent might have had shares appointed to them under the power, and not being made objects of it, if their parent had been dead they would have taken his share; yet as he was alive, it was impossible to hold that a child of a living parent could take any share, *though it was clear that they might [*207] have been made substantive objects of the appointment: (r) and this case was followed in a subsequent case before Lord Kenyon, sent out of the Court of Chancery, (s) the certificate of the Judges in which case was confirmed by the Lord Chancellor, on the 18th December, 1802. -

15. And here it may be remarked, that a gift to children in default of appointment is not confined to those only who are alive at the death of their parent, to whom the power is given, although the power is to appoint only by will, but all the children take vested interests upon their birth, subject to be divested by the execution of the power: and therefore the share of a child in the lifetime of his parent will, in default of appointment, go to its representative. And the same rule would prevail as to other objects. (t)

16. But where there is only one direction, which includes expressly the power to appoint, and by implication the gift in default of appointment, those only can take in default of appointment who could have taken under the power: and consequently if the power is confined to a will, the objects to take must be living at the death of the donee of the power. (u)

17. In a case, where the gift by will was to trustees to dispose of the fund amongst the testator's brothers and sister, or their children, in such shares and proportions, and at such time or times as the trustees should think proper, Sir W. Grant held, that they might have elected to whom the fund should go, the parents or the children. But the power not having been executed, the Court had not that discretion, but had only to say what class was to take, and then the distribution must be equal. The fund was given *by the decree to the parents and all [*208]

(r) *Routledge v. Dorril*, 2 Ves. jun. 357.

(s) *Legard v. Haworth*, 1 East, 120. See *Longmore v. Broom*, 7 Ves. jun. 124; *Fox v. Gregg*, App. No. 23.

(t) *Vanderzee v. Aclom*, 4 Ves. jun. 771; *Heron v. Stokes*, 2 Dru. & War. 89.

(u) *Woodcock v. Renneck*, 4 Beav. 190.

the children living at the testator's death, and the representative of such as had since died *per capita*.(x)

18. And, as we shall hereafter see, a direction that children shall stand in the place of their parents, although following a gift in default of appointment, may be so strongly worded as to make the children of a deceased parent objects of the power, as well as legatees in default of appointment.(y)

19. In *Harrington v. Harte*(z) the testatrix gave the fund as her daughter should appoint. In default of appointment her daughter to receive the dividends, and after her death to such persons as she should by deed or will appoint, and in default of appointment, in trust for such person or persons as would *then* by virtue of the statute be entitled to the testatrix's personal estate if she had died intestate: it was held that *then* was to be taken as an adverb of relation and not of time,(I) and it must therefore go to such persons as were next of kin to the testatrix at her death.

20. If a power be confined to children living at the death of the donee, and in default of appointment the fund is given to *such* children, the word *payable* in a gift over will not be read *vested*, so as by construction to enlarge the gift to those who attain the specified age, but die in the lifetime of the donee of the power.(a)

21. And where an estate was settled upon a marriage upon the children to be begotten and their heirs forever, in *such shares and proportions* as the husband should appoint, and for want thereof, upon all the children and their heirs forever, the latter [*209] gift, which imported joint-tenancy, was held not to be controlled by the previous gift and power, nor by a gift over, from which it was contended that the settlement intended a tenancy in common.(b)

22. These decisions establish a proper rule—that clear words in one limitation shall not lightly be controlled by implication arising from another limitation.

(x) *Longmore v. Broom*, 7 Ves. jun. 124.

(y) *Fox v. Gregg*, App. No. 23.

(z) 1 Cox, 131.

(a) *Bielefield v. Record*, 2 Sim. 354.

(b) *Stratton v. Best*, 2 Bro. C. C. 233.

(I) This is ordinarily true; but this gift was not in default of appointment, then to such persons, &c., but it was in default of appointment to such persons as should then [at that time] be entitled.

23. It seems doubtful whether, if one object be removed by the effect of advancement, the share shall go to the others, under the provision in default of appointment, or whether it shall be considered as a purchase by the father at the sum advanced, or as a payment by him to the benefit of which he is entitled. This question arose in the recent case of *Folkes and Western*.^(c) Under the trusts of a term, trustees were to raise 4,000*l.* for younger childrens' portions, to be paid, if more than one, as the father and mother, or survivor, should appoint; in default of appointment, as usual, with a provision that if the father should advance any daughter in marriage, unless he should in writing declare it not to be for her portion, such daughter should receive only so much further portion as with the sum advanced would make up the portion provided by the settlement. Another 4000*l.* was settled in the same way. There were two younger children, both daughters; upon the marriage of one, the father gave her a portion, which, it was declared, should be a satisfaction for her claims under the settlement. The Master of the Rolls held, that as the daughter had no definite interest, except in default of appointment, she had nothing that she could make the subject of a bargain with her father; he could not say that any definite proportion had sunk. If she had had a definite interest, it would, he admitted, have sunk, and therefore have been no charge on the estate. He thought, then, that the case could only be compared to the cases upon the custom of London, where the 'effect of advancement was merely to remove that child [*210] out of the way, and to increase the shares of the others, and not to increase the disposable part of the father's estate. This provision, he added, must have the same effect; removing the daughter, putting her out of the question altogether, as if there never had been such a child. Therefore, before the power ever arose, there ceased to be objects, for it was impossible the mother, who had survived her husband, could give any thing to the daughter advanced. That was expressly stipulated, and she was incapable of receiving any more than if she was dead. The consequence was, that of two objects being removed, the other must of necessity take the whole.

(c) 9 Ves. jun. 456. See *Noel v. Lord Walsingham*, 2 Sim. & Stu. 99; see pl. 28, *infra*.

24. This decision appears to be in direct opposition to a case not adverted to. I allude to Pitt and Jackson, or Smith and Lord Camelford, (d) where money was directed to be laid out in land, to the use, after the deaths of the husband and wife, of the children of the marriage, as the father should appoint, and in default of appointment, as the mother should appoint, with remainder, in default of appointment, to the children in tail. There were two children. The father, considering the money as not laid out in land, by his will, gave rather more than a moiety of it to Ann, one child, and the remainder to Mary, the other child. After the will, and upon the marriage of Ann, he advanced her a large portion, and soon afterwards by a codicil revoked the legacy to her. And it was conceded by the counsel for Ann and her husband, and accordingly decreed by Lord Kenyon at the Rolls, that the legacy was well revoked, as the father was a purchaser of that moiety by the fortune given to Ann upon her marriage. Upon a bill of review being filed to this decree, which involved other points, Lord Rosslyn held that the fund had been invested in the purchase of an estate: and that the appointment in the will of the

fund could not be supported as an appointment of the [*211] estate. He considered, therefore, that the estate must go as in default of appointment: but as to Ann, he thought her father had satisfied all the interest that she could, as a creditor, set up in opposition to any act in his will, in regard to her provision under the marriage settlement. She was totally in his power by the portion given to her upon her marriage, *when her interest under the appointment was contingent and uncertain, in respect of the possibility of the existence of other children.* But he thought that even a well-executed appointment could not take from Mary, the other daughter, one moiety; for though the father could entitle himself to all Ann could claim, it could be only to *that* she could claim *absolutely* against the other daughter. He could not make an appointment in truth beneficial to himself.

25. It is to be regretted that this case, which carries with it the joint authority of Lord Kenyon and Lord Rosslyn, was not adverted to in the case of Folkes and Western, more especially as in the latter case was decided by analogy to cases which do not necessarily bear upon it, and which are themselves not founded

(d) 2 Bro. C. C. 51; 2 Ves. jun. 698. See 2 Myl. & Cra. 253.

in reason; for it was admitted that in those cases one should think, *primi facie*, the effect of advancement by the father would be to increase that part of the estate of which he had power to dispose. Lord Rosslyn avoided the objection upon which the opinion of the Court was grounded in *Folkes and Western*, viz., that the interests being contingent and uncertain, there was nothing that could be made the subject of the bargain, by holding the advancement to be a purchase of the child's share in default of appointment, or of what she could become entitled to under an appointment. The only objection to this construction appears to be, that where the power is given to the wife if she survive, the advancement circumscribes her power; for as the husband himself cannot appoint a greater portion to the child he has advanced than the child would take in default of appointment, because it would in effect be an appointment to himself, it seems equally to follow that the wife could not appoint a ['212] larger share, lest such a power should open a door to fraud on the other child. But still the wife's power might well be held to remain, so as to enable her to give the same share to the daughter *unadvanced*, as she might have given to her if the other daughter had not been advanced, and the father's representatives must be content with the share which may be appointed by the wife to the advanced daughter, or may be permitted to descend to her. The only infringement then on the mother's power would be this, that in case of disobedience, she could not deprive the unadvanced child of the share provided for it in default of appointment, but she would have the best possible hold on the obedience of the child, in the power which would still remain of increasing the portion given in default of appointment. Besides, if the curtailment of the power be an objection, it bears with the greatest possible force on the rule as established by *Folkes and Western*, for there, by the effect of the advancement, it was holden, that the entire fund was at once given to the unadvanced child, and consequently the mother was deprived of all power over the fund. It would seem, therefore, that till the cases come again under the review of the Court, it would not be safe in practice to consider the case of *Pitt and Jackson* as overruled.

26. In *Noel v. Lord Walsingham*, (*e*) Sir John Leach, V. C.

observed, that having carefully considered the case of *Folkes v. Western*, he did not concur in the observation made at the bar, that there was error in that decree, inasmuch as it was not declared that the father was a purchaser of the daughter's share. There was in that case no expressed intention on the part of the father to that effect. He had more difficulty as to that part of the decree which declares that the mother had lost her power of appointment. The settlement gave her in the event, which happened, of her surviving her husband, a power to appoint [*213] the whole fund to any one child, and the act of the husband in providing a satisfaction for one child, could not, he thought, deprive the widow of her power to appoint the whole fund to the only other child. And such appointment appeared to him to have been necessary, in order to enable the only other child to take the whole fund; for there being in fact no appointment either by husband or wife in favour of any child, the consequence should seem to be that the unprovided child could take only a moiety of the unappointed fund, and that the other moiety, which by the terms of the settlement would vest in the provided child, would sink for the benefit of the estate charged, if, as he thought, the father could not be considered as a purchaser, but otherwise would be a part of the personal estate of the father. The case of *Boyle v. Bishop of Peterborough* bore strongly upon this view of the case.

27. In a case in Ireland where the point did not call for a decision, the Lord Chancellor approved of *Folkes v. Western*, without at all examining the case of *Pitt v. Jackson*. He said it had been argued that inasmuch as the portion was to be considered as vested, though liable to be divested, therefore Sir W. Grant was not warranted in considering it as unascertained: this, he added, seemed founded on a mistake; for being vested is one thing, and being ascertained is another. A portion of 1,000*l.*, the right to which is vested, but which is liable to be reduced to any sum not illusory, is just as unascertained as if it were entirely contingent. (f) But, as we have seen, according to Sir W. Grant, the power of appointment is gone; and therefore the share of an only remaining child is both vested and ascertained.

28. Where by the terms of the settlement any advance made

(f) *Brownlow v. Meath*, 2 Ir. Eq. Rep. 383; 2 Dru. & Wal. 674.

by the father in his lifetime is to be taken in or towards satisfaction of the portion provided by the settlement for a younger child, unless the father shall declare the contrary ;—the true construction of this provision is, that if the father make *an advance to an object of the settlement without any [*214] declaration of intention in respect to it, the advance operates to the exoneration of the estate charged with the portion, but that the father is at liberty to declare that the child advanced shall notwithstanding receive its full portion, or is at liberty to consider himself *pro tanto* the purchaser of the portion, and to declare in effect that it shall remain a charge upon the estate for his benefit. This was laid down by Sir John Leach, (g) and appears to be the true rule : but it does not meet every case. Where the portions are actually a fund raised, there is no estate to be discharged, and the question simply is, to whom the child's portion is to belong,—to the parent who has paid it, to the child who has already received it, or to the other children by way of increase to their portions? Of course the child who is fully advanced, and barred by the very provision, cannot take : it would as we have seen, be difficult to give it to the other children, unless the parent has shown an intention so to bestow it. Supposing there be two children and a fund of 2,000*l.*, and the father upon the marriage of one advances her 1,000*l.*, which is to be a satisfaction of her portion, can it be presumed that he intended the unadvanced child to have the whole 2,000*l.* simply because he makes no declaration. If a father has secured the portions by covenant or bond, the advancement ought to go *pro tanto* in performance of his obligation. It was never doubted that the father might keep alive the portions for his own benefit ; (h) and he is under no obligation to pay them off. Where the settlement is silent as to advances, the question is one of intention. Where there is such a clause, it really only expresses the rule of equity, and it is rather to regulate the rights of the child advanced than to declare the effect of the advancement on the fund and the other children. It appears *to have been overlooked that in Folkes and [*215]

(g) 2 Sim. & Stu. 110. See 9 Mod. 470; Goolding v. Haverfield, M'Clel. 345; Fazakerley v. Gillibrand, 6 Sim. 591.

(h) Countess Gower v. Earl Gower, 1 Cox, 53.

Western the provision by the father was by a covenant that he, his heirs, &c., would pay the portion within six months after the death of himself and his wife, and 400*l.* a year in the meantime; and it was declared that that sum should be deemed a satisfaction of all such claims as the daughter might have to the settlement fund. It would be difficult to maintain that the father was not entitled to the aid of the child's portion to perform his covenant to pay a sum in satisfaction of that portion. The father's act did not manifest an intention to exonerate the estate, or to increase the portions of the other children.

29. In *Noel v. Lord Walsingham*,⁽ⁱ⁾ two points were raised, neither of which presented any difficulty. By the trusts of a term 15,000*l.* was to be raised, and was in effect settled for the portions of daughters in such shares as their father should appoint, and in default of appointment, to them equally, with a proviso that advancements by the father should go *pro tanto* as their portions. Upon the marriage of one of five daughters, Matilda, the father advanced her 7,000*l.*, and by deed regularly appointed to her 3,000*l.*, being one-fifth of the whole sum, and by another deed the daughter and her husband assigned the 3,000*l.* appointed to her, unto the father absolutely. By his will he directed the whole 15,000*l.* to be paid to his daughters, except Matilda. The Vice-Chancellor considered it necessary to decide the point, but he observed that the father became the purchaser of 3,000*l.* which he had appointed to Matilda, and that sum not being more than her aliquot share of the 15,000*l.*, it might be difficult to question the validity of that appointment or purchase.

30. The other point arose thus: upon the marriage of another daughter, Gertrude, the father advanced her 10,000*l.*, and she by deed released to him and his heirs all her right, &c. in and to the estates charged with the portions. By a codicil to [216] his will made the next day, he in consideration of the provision made for his daughter Gertrude, revoked the appointment in his will with respect to the 15,000*l.*, so far as respected his daughter Gertrude and her share of the same, but not further or otherwise with respect to his other daughters, except Matilda. The Vice-Chancellor said, that he concurred with the argument that the deed of release might under the circum-

stances be treated as an assignment of her interest in the 15,000*l.* to her father, and he took the true intent and effect of his codicil to be not to leave one-third unappointed; but as his will had given the 15,000*l.* equally between his daughters, except Matilda, that the intention of the codicil was further to except Gertrude, and to give the 15,000*l.* equally between the other daughters: and so decreed.

31. These cases prove that the father, even where there is a clause as to advancements, may keep the child's portion on foot for his own benefit, and even a release by the child in form may, in favour of the intention, be deemed an assignment. It is quite clear in the above case that the release and codicil were intended to operate as an increase of the remaining daughters' portions, and not an exoneration *pro tanto* of the estates charged with them.

32. In a case before Lord Hardwicke, (*k*) where 20,000*l.* was provided for younger children, subject to the father's appointment, he made other provision for the only younger son, on condition that he released his share of the first fund; the father then recited his desire that the whole of the 20,000*l.* should be divided between his daughters, but made no other appointment of the son's share to them. By his will he gave to his daughters so much as, with what was *provided* by the settlement for them, would make up their fortunes 10,000*l.* The daughters required 10,000*l.* a-piece beyond the 5,000*l.*, which was not provided for them by the settlement, but purchased from the son for their benefit. Of course this was refused. Lord [*217] Hardwicke said he had not made a direct gift of the son's 5,000*l.* to them, *but after he had put it in his power* he considered the whole 20,000*l.* as provided for them by the marriage settlement, the whole right arising under that, he only exercising the power he had over it.

33. In the cause of *Simpson v. Paul*, (*l*) where a fund was settled to be divided between the children, in shares as the husband and wife, or in default thereof, the survivor of them should appoint, but in default of such appointment the fund was to be equally divided between the children, unless the husband and wife or the survivor should otherwise appoint the same: upon the

(*k*) *Duke of Bridgewater v. Egerton*, 2 Ves. 122.

(*l*) 2 Cox, 34; vide *supra*, p. 201.

marriage of one of the daughters a joint appointment was made of a third of the sum to her, which was to belong to her as *her share* of the fund; *and the wife and her intended husband released all claim to the fund.* It was, as we have seen, held that the wife as survivor could *not* increase the daughter's share; and Lord Northington held, that the two only other children were entitled equally to the whole of the unappointed fund. But whatever may have been the real intention of the person executing the power, appointments to several of the children of equal portions of the fund will not by construction amount to an equal appointment to all, so as to exclude those to whom shares are appointed from participating in the gift in default of appointment.^(m) And an appointment to a child of an equal share as her share, but not in lieu of her share, will not, as already observed, exclude her from a portion of the residue.

34. In *Fortescue v. Gregor*,⁽ⁿ⁾ there was a gift by will to the children of A., deceased, of 1,000*l.*, to be paid to them in such shares as B. should direct. There were three children, and upon a bill filed one of the children presented a petition ['218] stating that B. was desirous that the fund should be equally divided amongst the three, and accordingly one-third was transferred to the petitioner. B. died without making any further appointment. Lord Rosslyn thought that the recital in the petition could not well be taken as an appointment. It came however, he said, to the same thing, for it was clear by the appointment he meant to give that child her share. Then at his death, when there could be no further appointment, the necessary consequence of his appointment was, that there was only two shares and two objects of the power, and there could be no survivorship.

35. The case was a peculiar one. The gift was *to* the children and B. had only to fix the shares and ages: and the power was held to make the gift itself operate as a tenancy in common. Now the decision made the appointment inoperative, for the fund went equally as in default of appointment. But although the recital in the petition could not operate *as an appointment*, yet it clearly showed that the petitioner was to take one-third as her

(m) *Wilson v. Piggott*, 2 Ves. jun. 351.

(n) 5 Ves. jun. 552.

share, and that the other two-thirds were to go as in default of appointment, so that the appointee accepted her one-third as a full satisfaction of her interest *under the gift* in the will.

36. Where an estate was devised to A. for life, and after his death to such of the testator's relations of the name of A., being a male, as A. should appoint, and in default of such appointment, to such of his relations of the name of A., being a male, as A. should adopt, if he should be living at A.'s death, and his heirs; and in case A. should not adopt any such male relation, or no such male relation should be living at A.'s decease, then to the next or nearest relation of the testator, being a male, or the elder of such male relations, if more than one of equal degree living at the testator's death, in fee: A. was, at the testator's death, his nearest male relation. A. died without having exercised the powers given to him by the will, and it was held by the Court of Exchequer that he took the fee in default of appointment. *Sir John Leach, M. R., thought this [*219] quite inconsistent with the limited power given to A., of appointing to a male relation of the name of A., that the testator should have intended to include A. in the description contained in the ultimate limitation, and thereby give him the power of defeating the object of the appointment, [*i. e.* give him an interest not to exercise the power]; and he accordingly sent the case to the C. P.(o) That Court, however, came to the same conclusion as the Court of Exchequer,(p) and the present Master of the Rolls confirmed the certificate.(q)

37. If the gift over of personal property in default of appointment is to the executors and administrators of the donee of the power, who is also tenant for life, the absolute property will pass to him, subject to the power; for such a limitation is, as to personal property, the same as a limitation to the right heir as to real estate—a limitation to the next of kin is like a limitation to heirs of a particular description, which would not give the ancestor, having a particular estate, the whole property in the land.(r)

(o) *Pearce v. Vincent*, 2 Myl. & Kee. 800.

(p) 2 Bing. N. C. 328.

(q) 2 Kee. 230. See *Jennings v. Newman*, 10 Sim. 219.

(r) *Anderson v. Dawson*, 15 Ves. jun. 536. See *Sanders v. Frank*, 2 Madd. 152; *Stocks v. Dodsley*, 1 Kee 325; *Wallis v. Taylor*, 8 Sim 241.

38. A bad appointment is a nullity: Therefore where the whole, or even part, of the fund is ill appointed, it goes according to its original destination in the event of there being no appointment. And consequently a person to whom a specific share is well appointed, shall not be excluded from taking any of the unappointed shares.(s) To guard against these decisions, where *part only* of the fund is well appointed, in which case the intention of the person executing the power is generally defeated, it is usual to insert an express clause in instruments creating powers of appointment amongst several objects, as children, that no child to whom a share is appointed shall take any share of the unappointed part until each of the other children shall have received a share equal to that appointed to him.

39. It has been held that where such a clause was added *to an appointment*, and part of the fund was not subject to the power, yet as the parties by mistake considered the whole of the fund as within the power, the appointee of a share,—as well where the fund subject to the power was sufficient wholly to supply the appointment, as where it was insufficient for that purpose,—could not take any part of the fund *not* subject to the power without bringing the appointed share into hotchpot.(t)

40. Generally speaking, a gift in default of appointment does not control the power. Thus, if a fund be settled on one for life, with a power to appoint to his children, and in default of appointment the fund is given to the children equally, and there is a declaration that upon children dying in the life-time of the father, leaving issue, their issue shall stand in their place, this declaration would apply only to the gift in default of appointment.(1)

41. Whether a power is to override the uses of the settlement, or to take effect only in default of the previous limitations, depends upon the context of the instrument creating the power. If the power is in terms unrestrained, but it is connected with a gift

(s) *Menzey v. Walker*, For. 72. *Alexander v. Alexander*, 2 Ves. 650; *Pocklington v. Bayne*, 1 Bro. C. C. 150; *Bristow v. Warde*, 2 Ves. jun. 336; *Wilson v. Piggott*, 2 Ves. jun. 351; *Routledge v. Dorril*, 2 Ves. jun. 357; *Smith v. Lord Camelford*, 2 Ves. jun. 608; *Attorney-General v. Ward*, 3 Ves. jun. 327. See 1 Ves. & Bea. 92, 93.

(t) *Warde v. Firmin*, 11 Sim. 235; a case of some difficulty.

(1) This does not seem to have been adhered to in *Fox v. Gregg*, App. No. 23.

in default of issue, and as a power to defeat the whole settlement, it would be inconsistent with a particular power of disposing of part of the fund; the power may by construction be confined to the event of there being a failure of issue.(u)

*42. Before we close these observations, we may ob- [*221]
serve, that if *by mistake* in a settlement on children, the estate *in default of appointment* is vested, not in the children, but in the husband, who was not intended to take unless *in default of issue*, equity will, upon sufficient evidence, correct the mistake, in like manner as mistakes in deeds generally are corrected in that court.(x)

(u) *Peddie v. Peddie*, 6 Sim. 78. The case itself is one of great nicety.

(x) *Pritchard v. Quinchant*, *Jenkins v. Quinchant*, Ambl. 147; 5 Ves. jun. 596, n.; *Barstow v. Kilvington*, 5 Ves. jun. 593.

[*222]

*CHAPTER XIII.

OF RELIEF AGAINST POWERS.

SECTION I.

OF THE RELIEF AFFORDED BY THE 27 ELIZ. C. 4, AGAINST POWERS
OF REVOCATION.

- | | |
|---|---|
| 1. Settlements with power of revocation voidable by statute.
2. Act does not extend to partial powers.
3. Conditional power within the Act.
4. Power with restrictions not within the Act. | 5. Immaterial that the settlement was for valuable consideration.
6. Future power within the Act.
7. Extinguishment of power unimportant.
8. Informal revocation not aided by the Act. |
|---|---|

1. We have seen in how many instances the *execution* of powers will be relieved against; we are now to proceed a step farther, and to inquire in what cases powers themselves will be set aside. I do not here speak of a power void in its very creation, as where the object of it is a perpetuity, or of a power not well created, but of powers well created, and which may, in the first instance, be legally executed: and this relief is given by the statute of 27 Eliz. c. 4, whereby it is enacted, that if any person or persons shall make any conveyance, gift, grant, demise, limitation of use or uses, or assurance of, in, or out of any lands, tenements, or hereditaments, with any clause, provision, article, or condition of revocation, determination or alteration, at his or their will or pleasure, of such conveyance, assurance, grants, limitations of uses, or estates, of, in, or out of the said lands, tenements, or hereditaments, or of, in, or out of any part or parcel of them, contained or mentioned in any writing, deed, or indenture, of [*223] such assurance, conveyance, grant, or *gift; and after

such conveyance, grant, gift, demise, charge, limitation of uses, or assurance so made or had, shall demise, grant, convey, or charge the same lands, tenements, or hereditaments, or any part or parcel thereof, to any person or persons, bodies politic and corporate, for money or other good consideration, paid or given (the said first conveyance, assurance, gift, grant, demise, charge, or limitation, not by him or them revoked, made void or altered, according to the power and authority reserved or expressed unto him or them, in and by the said *secret* conveyance, assurance, gift, or grant.) that then the said former conveyance, assurance, gift, demise and grant, as touching the said lands, tenements, or hereditaments, so after bargained, sold, conveyed, demised, or charged against the said bargainees, vendees, lessees, grantees, and every of them, their heirs, successors, executors, administrators, and assigns, and against all and every person and persons which have, shall or may lawfully claim any thing by, from, or under them, or any of them, shall be deemed, taken, and adjudged to be void, frustrate, and of none effect, by virtue and force of the act; provided nevertheless, that no lawful mortgage to be made *bonâ fide*, and without fraud or covin, upon good consideration, shall be impeached or impaired by force of the act, but shall stand in the like force and effect as the same would have done if the act had never been made.

2. To understand the operation of this statute, we must consider, 1st, what instruments are avoided by it: and secondly in favour of whom. And first it is to be observed, that the statute does not extend to particular powers, as a power to charge 2,000*l.* on an estate of considerable value, for such a power is not a power within the words of the statute (being for a particular sum,) to revoke, determine, or alter the estate.(a)

3. But it is of course clear, that a settlement by which a power of revocation, or a power tantamount to it, is reserved to the grantor, is void against a subsequent purchaser,(b) ['224] and no artifice of the parties can protect the settlement. Therefore, although the power be conditional, that the settlor shall only revoke on payment of a trifling sum to a third per-

(a) *Jenkins v. Keymis*, 1 Lev. 150.

(b) *Cross v. Faustenditch*, Cro. Jac. 180; *Tarback v. Marbury*, 2 Vern. 510. See Lane, 22.

son(*c*) or with the consent of any third person, who is merely appointed by the grantor, (*d*) in these and the like cases the condition will be deemed colourable, and the settlement will be void against a subsequent purchaser. (1)

4. But where a settlement is made, with a power to the settlor to revoke, so as that the money be paid to trustees to be invested in the purchase of other estates, (*e*) or to revoke with the consent of a stranger *bonâ fide* appointed by the parties, and his consent is made requisite, not as a mere colour, but for the benefit of all

(*c*) Griffin v. Stanhope, Cro. Jac. 454.

(*d*) See 3 Rep. 826; Lavender v. Blackston, 3 Keb. 526; Bridg. 23.

(*e*) Doe v. Martin, 4 Term Rep. 39.

(1) "In Reade v. Livingston, 3 Johns. Ch. Rep. 481, Chancellor Kent decided, that a settlement after marriage, in pursuance of a *parol* agreement entered into before marriage, was not valid against creditors. He refers to Beaumont v. Sharp, 1 Vez. sen. R. 27; Belt's Supp. 25, S. C., as in point. See also Atherly on Marr. Sett. 149."—[Note to 1 Am. ed.]

The doctrine in Reade v. Livingston is now somewhat qualified. "A fair voluntary conveyance, may be good against creditors, notwithstanding its being *voluntary*. The circumstance of a man's being indebted, at the time of his making a voluntary conveyance, is an *argument* of fraud. The question in every case therefore, is, whether the act done is a *bonâ fide* transaction, or whether a trick or contrivance to defeat creditors." Cadogan v. Kennett, Cowp. R. 434, per Lord Mansfield. If this language contains a true exposition of the law on this subject, then the question of fraud, or not, is open in all cases, where a man is indebted, as a matter of *fact*; and the law does not absolutely pronounce, that the indebtedness *per se* makes the settlement fraudulent. See 1 Story's Eq. Jur. § 359, and notes; Verplanck v. Strong, 12 Johns. R. 536; Jackson v. Town, 4 Cowen R. 603; Wickes v. Clark, 8 Paige's Ch. Rep. 161. 165; Seward v. Jackson, 8 Cowen R. 406; and see particularly, per Spenser, Senator, p. 433, 434, 435, citing and relying upon the opinion of Mr. Justice Thompson in Hind's Lessee v. Longworth, 11 Wheat. U. S. Rep. 213. The case of Reade v. Livingston, cited *supra*, was assailed in Seward v. Jackson, by the counsel; but one Senator "left the doctrine of that case untouched." See the opinion of Stebbins, Senator, p. 436. Another Senator, however, overturns the doctrine of C. J. Kent, not without some hesitation. "Opinions coming from such a source, press upon the mind with great weight, and are entitled to the highest respect and consideration. But being in a Court where the law is to be finally settled, and considering the importance of the principle, I have examined the authorities cited in that case, and some others, and have come to the conclusion, that the *legal presumption there laid down* as the doctrine of the Courts is *not warranted*." Per Allen, Senator, p. 438. "The doctrine of Reade v. Livingston, and of those English Chancellors upon whom it rested, is, as I greatly fear, too stern for the present times." 2 Kent's Com. 442, note (*a*) 5th ed. The American authorities are very numerous, and as they may all be found collected in 2 Kent's Comm., cited *supra*, it is not thought necessary to cite them here.

parties, the settlement will be valid, and cannot be impeached by a subsequent purchaser.(f) This was determined in the case of *Buller v. Waterhouse*.(g)

5. Mr. Powell thought the point was not settled by the above case, because all the claimants under the conveyance were purchasers for a valuable consideration.(h) But it seems to be immaterial whether the settlement is merely voluntary, or upon valuable consideration.(i) The statute says, that all conveyances which the grantor has power to revoke shall be void against subsequent purchasers; and therefore if parties giving a valuable consideration for a settlement choose to permit the grantor to reserve a power to revoke the settlement, they must suffer for their folly. The grantor, by virtue of the power, may revoke the settlement; and if he sell the estate without [*225] revoking it, the statute makes it void. In fact if we hold that settlements upon valuable consideration are not within this provision, we must at the same time admit that the Legislature did not intend to affect the voluntary settlements unless they were actually fraudulent; for voluntary settlements are void against purchasers under the second section of the act. This clause, therefore, would, under the construction put upon it by Mr. Powell, have scarcely any operation.

6. If a man having a power at a future day to revoke a settlement made by him, sell the estate before the day arrive, the settlement will be void against the purchaser, at the time when the vendor, according to the terms of the power, might have revoked the settlement.(k)

7. And a settlement made with power of revocation will be void against a subsequent purchaser, although the grantor release or extinguish the power previously to the sale, otherwise the vendor might secretly release or destroy the power, and then show to the purchaser the conveyance containing the power of revocation, and so induce him to buy the land.(l) In the case, how-

(f) See *Leigh v. Winter*, 1 Jo. 411; and see *Lanc*, 22; *Lord Banbury's case*, 2 Freem. 8.

(g) 2 Jo. 91; 3 Keb. 751; and see acc. *Hungerford v. Earle*, 2 Freem. 120.

(h) *Pow. on Powers*, 330.

(i) See acc. *Rob. on Vol. Conv.* 637.

(k) *Standen v. Bullock*, Mo. 618; 3 Rep. 82 b; *Bridg*. 23.

(l) *Bullock v. Thorne*, Mo. 615.

ever, in which this was decided, the settlement appears to have been voluntary, and the purchaser had not notice of the power being destroyed. But if a settlement could be made for valuable consideration, with a power of revocation, and the vendor should afterwards release the power for a valuable consideration, it is conceived that a purchaser, subsequently to the destruction of the power, could not prevail over the settlement, more especially if he had notice of the power being released.

8. The statute, as we have seen, operates conditionally, that is, where the first conveyance is not revoked according to the power. The act has no effect until the donee of the power sell the estate, without revoking the first conveyance by virtue of his [*226] power. Suppose then a vendee professes to execute his power, but it is informally exercised, will the defect be cured by the statute? The Legislature intended to protect purchasers against fraudulent settlements, with power of revocation; for it is essential, to bring a case within the act, that the estate should be sold, and the first conveyance not be revoked according to the power reserved to the grantor by such *secret* conveyance. The non-execution of the power is the fraud which the statute intended to avoid. The conveyances against which the act was intended to operate were presumed to be *secret*. It was not meant to relieve any man who was aware of the existence of the power, and might have required it to be exercised. The statute was not intended to operate as a mode of conveyance. But, without insisting that where a purchaser is aware of the settlement he must require the power to be executed, it may be urged, that where a purchaser does rest his title on the execution of the power, he rejects the aid of the Legislature, and takes his title under and not in opposition to, the settlement; and can therefore only stand in the same situation as any other purchaser who has unfortunately taken an estate under a power defectively executed. The purchaser can scarcely be held to have a good legal title, unless the vendor not only attempted to execute the power, but actually conveyed the estate to him.

SECTION II.

[*227]

OF THE PERSON WHO MAY CLAIM THE RELIEF.

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|--|---|
| <ol style="list-style-type: none"> 1. Purchaser only to be relieved. 2. Bona fides and adequate consideration required. 3. Lessee, mortgagee, conuzee, a purchaser. 4. Settlement before marriage sufficient. 5. So agreement before marriage, or portions afterwards. 6. If an agreement before marriage, and settlement after it, the agreement must be in writing, semble. 9. Wife's concurrence in settlement a valuable consideration. | <ol style="list-style-type: none"> 10. So upon a separation, a covenant to indemnify the husband against the wife's debts. 11. Voluntary settlement after marriage not aided by statute. 12. What interest must have been contracted for. 13. Where a conveyance is void against creditors under 13 Eliz. c. 5. 14. Claim of creditor by covenant before breach. |
|--|---|

1. IN Upton and Bassett's case,^(m) it was resolved, that no purchaser should avoid a precedent conveyance made by fraud and covin but he who is a purchaser for money, or other valuable consideration; for though in the preamble it is said (for money, or other good consideration,) and likewise in the body of the act, relating to voluntary conveyances (for money or other good consideration,) yet these words (good consideration) are to be intended only of valuable consideration; and that appears by the clause now under consideration, for there it is said, "for money, or other good consideration paid or given;" and this word "paid" is to be referred to *money*, and "*given*" is to be referred to *good consideration*, so the sense is *for money paid, or other good consideration given*; which words exclude all consideration of nature or blood, or the like, and are to be intended only of valuable considerations which may be given; [*228] and therefore he only who makes a purchase of land for a valuable consideration is a purchaser within this statute.

2. And to take advantage of this statute the purchaser must have purchased *bona fide* without deceit or cunning, and for a valuable and not inadequate consideration.⁽ⁿ⁾

(m) 3 Rep. 83 a; Cro. Eliz. 444.

(n) Upton v. Basset, Cro. Eliz. 444; Needham v. Beaumont, 3 Rep. 83 b; 2 And. 233; Doe v. Routledge, Cowp. 705. See Bullock v. Sadlier, Ambl. 764; Doe v. James, 16 East, 212.

3. And a lessee with(*o*) or without a fine.(*p*) as well as a mortgagee.(*q*) or it should seem a comuzee of a recognizance, or any who for a valuable consideration have any charge out of the and or upon the land.(*r*) is a purchaser within the statute.

4. So a settlement made on a wife or children *prior* to marriage is a conveyance for a valuable consideration, by reason of the marriage itself.(*s*) And the marriage consideration runs through the whole settlement, so far as it relates to the husband and wife and issue.(*t*) And there are cases in which the marriage consideration will extend to remainders to collateral relations.(*u*)

5. So if an agreement be entered into before the marriage, for a settlement of the estate.(*x*) or the husband receive an additional portion with his wife.(*y*) the settlement, although made after marriage, will be deemed valuable. So, even an agreement to pay the husband a sum of money as a portion will [*229] *support the settlement made after marriage, if the money is paid according to the agreement.(*z*)

6. But it should seem that the agreement before marriage must be in writing, for the Statute of Frauds expressly provides that no action shall be brought on any agreement made upon consideration of marriage, unless there be some memorandum thereof in writing, and signed by the party to be charged:(*a*) and it is of course clear that the subsequent marriage does not operate as a part performance. Fraud is an exception to every rule.(*b*) But it was said by Lord Chancellor Parker, according to one report of the case of Montacute and Maxwell.(*c*) “ that a parol promise

(*o*) *Coss v. Faustenditch*, Cro. Jac. 180.

(*p*) *Hinde v. Collins*, Cro. Jac. 181, cited.

(*q*) *Goolright v. Moses*, 2 Blac. 1019; *Chapman v. Emery*, Cowp. 279.

(*r*) See *Garth v. Ersfield*, Bridg. 22.

(*s*) *Colville v. Parker*, Cro. Jac. 158; *Douglas v. Ward*, 1 Cha. Ca. 99; *Brown v. Jones*, 1 Atk. 188.

(*t*) *Nairn v. Prowse*, 6 Ves. jun. 752.

(*u*) See 2 Treat. of Purch. p. 162.

(*x*) *Griffin v. Stanhope*, Cro. Jac. 454; *Sir Ralph Bovie's case*, 1 Ventr. 193.

(*y*) *Colville v. Parker*, Cro. Jac. 158; *Jones v. Marsh*, For. 64; *Stileman v. Ashdown*, 2 Atk. 477; *Ramsden v. Hylton*, 2 Ves. 304.

(*z*) *Brown v. Jones*, 1 Atk. 188.

(*a*) 29 Car. 2, c. 3, s. 4.

(*b*) *Montacute v. Maxwell*, 1 P. Wms. 618; 1 Str. 236; *Prec. Cha.* 526.

(*c*) 1 Str. 237.

on marriage is sufficient consideration to support a settlement made agreeable to it after marriage. This had been frequently determined." The *dictum* was made upon an agreement for a settlement of *personalty*, to which the statute of 27 Elizabeth does not apply. Lord Thurlow, in a case also upon personal estate, where the bill was filed by creditors, although he held that a parol agreement for a settlement before marriage was void, yet asked, whether there was any case, where, in the settlement [after marriage] the parties recited an agreement before marriage, in which it had been considered as within the statute; to which Lord Eldon, then Solicitor-general, answered, that he did not think it would be good.(*d*) This is according to Mr. Vesey's report: but according to Mr. Cox's report, since published, Lord Thurlow decided the very point. He said, he could not conceive that a settlement made after marriage, in pursuance of an agreement before marriage, although only parol, could ever be reckoned a fraudulent settlement: that the cases, though they had gone a great way in treating settlements after marriage as fraudulent, had never gone to such a [230] length as that, and he was, therefore, clearly of opinion that the settlement was in itself valid.(*e*) Sir W. Grant, with the first report only before him, observed, in *Randall v. Morgan*,(*f*) that there were *dicta* that a settlement after marriage, reciting a parol agreement before marriage, was not fraudulent, against creditors, provided the parol agreement has actual existence: but he did not know that the point had been directly decided. It was discussed in *Dundas v. Dutens*, but Lord Thurlow, though inclined that it should stand good, said, it was a mere matter of curiosity if the first point was against the plaintiff, as it was. In *Lavender v. Blackstone*, it was stated incidentally, in a case upon a voluntary settlement of real estate after twenty-one, by a man who married under twenty-one, that Hale held, that although it was proved, that upon the marriage he promised to settle his estate, when he should attain twenty-one, upon himself and his issue (which was agreed to be a sufficient considera-

(*d*) *Dundas v. Dutens*, 1 Ves. jun. 199, 200. In *Shaw v. Jakeman*, 4 East, 207, Lord Thurlow's question is represented as a decision.

(*e*) 2 Cox, 235; *Lord Glengall v. Barnard*, 1 Kee. 769.

(*f*) 12 Ves. jun. 74.

tion to avoid fraud, although infants are not bound in law to perform such promise,) yet the settlement not being made until three or four years after he attained twenty-one, and not being directly settled according to his promise, shall not be presumed to be made in performance of his promise, without direct proof of it.(g) It has escaped observation that this case arose before the Statute of Frauds, and therefore cannot rule the point at this day. The question, however did not call for a decision, and the infant received a portion of 2,000*l.* with his wife. There is a *dictum* to the same effect in Sir Ralph Bovie's case, upon a promise by an adult, where he received a portion with his wife, but that case also arose before the statute.(h)

[*231] 7. The only case upon real estate since the statute is *Spurgeon v. Collier*.(i) There, shortly after the marriage, a settlement of real estate was made by an uncle in favour of his niece and her husband, and the issue. Evidence was offered to prove a parol agreement prior to the marriage, which was not satisfactory, and Lord Northington was of opinion that if proved it would not better the case. It was, he said, admitted that since the statute, though such promise was made, the husband could have no remedy. Then the settlement was voluntary, for it could not be compelled. It was made to a person having no right to demand it; for where there was no remedy there was no right. But if such a parol agreement were to be allowed to give effect to a subsequent settlement, it would be the most dangerous breach of the statute, and a violent blow to credit. For any man on the marriage of a relation might make such a promise, of which an execution never could be compelled against the promissor, and the moment his circumstances failed he would execute a settlement, pursuant to his promise, and defraud all his creditors.

8. It would seem, therefore, that now in a naked case of a parol promise before marriage, without a portion with the wife, a settlement after marriage of real estate would be merely voluntary. A settlement after marriage upon a wife or children, without any previous agreement, is upon good, although not valuable,

(g) *Lavedder v. Blackstone*, 2 Lev. 146.

(h) 1 Vent. 134; and see *Griffin v. Stanhope*, Cro. Jac. 454, where the question, it should seem, was raised by creditors.

(i) 1 Eden, 55.

consideration. It is a performance of a moral obligation. *(k)* The mere agreement by parol before marriage, to make such a settlement, does not place the case higher. The settlement is still only a performance of a moral obligation, for the parol promise is rendered unavailable by the Statute of Frauds. In each case the consideration is a good one, but it is a duty of imperfect obligation on the party to make the settlement. [*232] The past consideration of marriage will not support the settlement, and the previous parol promise is not binding; therefore the settlement is merely voluntary. It may perhaps be binding on creditors although void against purchasers. *(1)*

9. The concurrence of his wife in destroying an existing settlement on her for the benefit of the husband, is a sufficient consideration for a new settlement, although much more valuable than the former. *(l)* And the better opinion, as well upon principle as in point of authority, seems to be, that the wife joining in barring her dower, for the benefit of her husband, will be a sufficient consideration for a settlement on her. *(m)* It has been decided, that the wife parting with her jointure is a sufficient consideration. Now, if that which comes in lieu of dower is a valuable consideration, surely the dower itself must be equally valuable. Besides, where a woman is entitled to dower, the estate cannot be sold to advantage without her concurrence; she is a necessary party to any arrangement respecting the estate, and that alone seems a sufficient ground to support a settlement on her. *(n)* But if an unreasonable settlement be made upon a wife in consideration of her releasing her dower, it seems that equity in favour of subsequent purchasers will restrain her to her dower. *(o)* But these points, now that the wife's dower is placed in the husband's power, can only arise on past transactions, or cases not within the late act. *(p)*

(k) See *Ellis v. Nimmo, Lloy. & Goo. temp. Sugd. 333; Holloway v. Headington, 8 Sim. 324; and see Stamper v. Barker, 5 Madd. 157.*

(l) *Scott v. Bell, 2 Lev. 79; Ball v. Bumford, Prec. Cha. 113; 1 Eq. Ca. Abr. 354, pl. 5. See Clerk v. Nettleship, 2 Lev. 118.*

(m) *Lavender v. Blackstone, 2 Lev. 146. See and consider Evelyn v. Templar, 2 Bro. C. C. 148.*

(n) *Vide Roe v. Mitton, cited infra.*

(o) *Dolin v. Coltman, 1 Vern. 294.*

(p) *3 & 4 Will. 4, c. 105.*

10. If upon a separation the husband settle an estate upon his wife, and a friend of hers covenant to indemnify the husband against any debts which she may contract, this will be [*233] a sufficient consideration to uphold the settlement "as valuable."*(q)* Indeed, the Court will anxiously endeavour to support a fair settlement: and nearly any consideration will be sufficient for that purpose. Therefore if a person whose concurrence the parties think necessary, join in a settlement, his concurrence will be deemed a valuable consideration, although he do not substantially part with any thing.*(r)*

11. It follows, therefore, that a conveyance, lease or mortgage, to a purchaser, lessee, or mortgagee, or to a wife or child, under the circumstances before mentioned, by a person having settled his estate with a power of revocation, is valid, although the power of revocation is not executed, for the settlement is defeated by the force of the statute of Elizabeth. But any conveyance executed by a husband in favour of his wife or children *after* marriage, which rests wholly on the moral duty of a husband and parent to provide for his wife and issue, is voluntary.*(s)* and consequently the prior settlement would not be void as against such a conveyance.

12. And the purchaser must have contracted for the interest, or an estate or right out of the interest,*(t)* to which the vendor would be entitled in case the first deed were void. Thus, in a case mentioned by Sir Edward Coke in his Commentary on Littleton,*(u)* A. had a lease of certain lands for 60 years, if he had lived so long, and forged a lease for 90 years absolutely, and he, by indenture reciting the forged lease, for valuable consideration, bargained and sold "the forged lease, and all his interest in the land, to B. Sir Edward Coke adds, that it seemed to him that B. was no purchaser within the statute

(q) Stephens v. Olive, 2 Bro. C. C. 90; King v. Brewer, ib. 93, n. See, however, Lord Eldon's Argument in Lord St. John v. Lady St. John, 11 Ves. jun. 526; Wellesley v. Wellesley, 10 Sim. 256.

(r) Roe v. Mitton, 2 Wils. 356. See Myddleton v. Lord Kenyon, 2 Ves. jun. 391.

(s) Woodie's case, cited in Colville v. Parker, Cro. Jac. 138; Goodright v. Moses, 2 Blackst. 1019; Chapman v. Emery, Cowp. 278; Evelyn v. Templar, 2 Bro. C. C. 148. See Parker v. Serjeant, Finch, 146.

(t) See Hatton v. Jones, Bul. N. P. 90.

(u) Co. Litt. 3 b.

of 27 Elizabeth, for he contracted not for the true and lawful interest, for that was not known to him, for then, perhaps, he would not have dealt for it; and the visible and known term was forged; and although by general words the true interest passed, notwithstanding he gave no valuable consideration, nor contracted for it; and of this opinion were all the Judges in Serjeant's Inn.

13. This is not the place to discuss the statute of 13 Elizabeth, c. 5. which avoids fraudulent gifts and settlements to defraud creditors, and of course applies to a voluntary appointment where the appointor has also the interest; *(x)* but we may simply observe, that although a *bona fide* voluntary settlement by a person not indebted at the time to the extent of insolvency would be supported against creditors, yet if it contain a general power to the settlor to dispose of or mortgage the estate, it will be deemed fraudulent as against creditors by statute and judgment, *(y)* for a power of revocation in such a deed is said to be a constant evidence of fraud; *(z)* but a power to revoke for a particular purpose may not make such a deed void. *(a)*

14. In a case where a man in a settlement of his wife's estate after marriage had a general power of appointment, and in default of appointment the fee was vested in him, but both power and estate were subject to a mortgage for years, an appointment by him to pay the mortgage and provide for his wife and children was supported against a prior creditor by covenant, as no debt appeared to have accrued by breach of covenant until [*235] after the appointment in execution of the power. *(b)*

15. Here we may notice a very different case: In *Jenney v. Andrews*, *(c)* a power by will was executed, and the donee afterwards became a bankrupt, obtained her certificate, and died: and it was held that the claim of the assignees was barred by the certificate, as the execution of the power did not operate till the death of the donee.

(x) *Whittington v. Jennings*, 6 Sim. 493.

(y) *Tarback v. Marbury*, 2 Vern. 510.

(z) See 2 Ves. 132, per Lord Hardwicke.

(a) See *Hungerford v. Earle*, 2 Freem. 136.

(b) *White v. Sansom*, 8 Atk. 410.

(c) 6 Madd. 264.

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*CHAPTER XIV.

OF A POWER TO APPOINT TO RELATIONS.

SECTION I.

OF THE EXTENT OF A GIFT TO RELATIONS.(1)

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|--|--|
| 2. Includes those entitled under statute of distributions. | 9. Most necessitous of my relations. |
| 3. Extends to real estate: includes maternal relations. | 10. Kindred, next of kin, &c. nearest entitled. |
| 4. And to descendants. | 11. Family, to whom it extends. |
| 5. A child in ventre sa mere, entitled. | 12. Wife excluded in gift to relations. |
| 6. Near relations, friends, &c. | 13. Statute controlled by direction as to tenancy in common, &c. |
| 7. Poor relations, &c. within the same rule. | 15. Parol evidence inadmissible. |

WE have now taken a general view of the whole of our subject ; but there is one power—that of appointing to relations—to which some peculiar rules apply, and which therefore requires a separate

(1) A devise to A. to live on, pay debts, and dispose of among my children and grand children, as she pleases, all the objects must be named, or it is void. *Knight v. Yarboro*, Gilmer's Cas. 27. A devise to A. for life, the balance to be distributed among her nieces, in such manner and at such time as she shall think proper, A. cannot disturb the equality of the *corpus* among the appointees, nor appoint to any other than the class named; her power is over the quality of the estate and the time of enjoyment. *Leibels v. Whately*, 2 Hill's S. C. Rep. 605. Where a devise was to A. for life with power by her will to make some provision or portion for B., it being within her discretion: *held*, that no Court has the power to say it is unreasonable as to the amount of the provision. *Frouty v. Frouty*, Bail. Eq. Rep. 530. A devise to A. and on trust to appoint among children, is a trust, and his power extends no further than to create an *inequality* among the children. *Withers v. Yeardon*, Richard. Eq. Rep. 324. So a direction to dispose of among donor's children, after gift for life to the devisee, as she should think proper, *held* to mean all his children. *Hudson v. Hudson*, 6 Munf. Rep. 352. See also *Jackson v. Vreeder*, 11 Johns. R. 170; *Porter v. Turner*, 3 Serg. & R. 108; *Morris v. Owen*, 2 Call, R. 520; *Frazier v. Frazier*, 2 Leigh's Rep. 642.

consideration. The usual powers in a settlement are to appoint to children, to create portions, to jointure, to sell and exchange and make partition, and to appoint new trustees; and each of these powers I still propose to consider in its order. This will, I hope, practically be found useful, although it will occasion some slight repetitions; but in discussing the general subject I have avoided introducing whatever is peculiar to these several powers, except where it was necessary in illustration of general principles.

1. We may now proceed to consider the power to appoint to relations. The observations already made on appointments in general, apply as strongly to a power of ap- [*237] pointment in favour of relations as to any other power, only, that it seems to have been thought that a power of appointment to relations may receive a more liberal construction in favour of an exclusive appointment than a power to appoint to children. (a) We need therefore only inquire, first, what sense is attached to the word relations, kindred, &c. which will show to whom the fund will go under such a bequest, in default of appointment; and, 2dly, To whom an appointment may be made under such a power.

2. Nothing is better established than that under a bequest to "relations," without saying *what* relations, the fund shall go amongst all such relations as are capable of taking within the Statute of Distributions; and this has been adopted as the best measure for setting bounds to such general words, for the relation may be infinite. (b) although, in two early cases, the Court extended it farther: (c) but these cases are clearly overruled by the current of authorities, and were expressly treated as of no authority by Lord Chancellor Camden in the case of *Widmore v. Woodroffe*. (d)

3. The same rule has been extended to a devise of real estate.

(a) *Spring v. Biles*, 1 Term Rep. 435, note; and see *Mahon v. Savage*, 1 Rep. t. Redesdale, 111.

(b) *Anon.* 1 P. Wms. 327; *Roach v. Hammond*, Prec. Cha. 401; *Crossly v. Clare*, Amb. 397; *Harding v. Glyn*, 1 Atk. 469; *Green v. Howard*, 1 Bro. C. C. 31; *Hands v. Hands*, 1 Term Rep. 437, n.; 3 Bro. C. C. 69, cited; *Rayner v. Mowbray*, 3 Bro. C. C. 234; *Mahon v. Savage*, 1 Rep. t. Redesdale, 111; and see *Rob. on Stat. of Frauds*, 64, n.

(c) *Jones v. Beale*, 2 Vern. 381; and *Arnold v. Bedford*, cited *ib.*

(d) *Amb.* 640.

and the relations on the maternal side are equally entitled with those on the paternal side, of equal degree.(e)

4. The same rule, it seems, would be applied to descendants, only that under such a gift it would go to such relations only as were descendants, which is still more limited.(f)

[*238] 5. And a child in *ventre sa mere* at the death of *the testator is, it would seem, a relation within the gift, notwithstanding the point was once ruled otherwise.(g)(1) The same strictness was once held in regard to a gift to children, but a child in *ventre sa mere* is now considered a life in being, and even to answer the description of a child *born* at the very period when it is in the womb.(h) This case seems to fall within the reason of the rule.

6. The construction is the same upon the words “*near relations*.”(i) And so upon a trust for “*friends and relations*,” Lord Hardwicke said, that *friends* was synonymous to *relations*, otherwise it was absurd.(k) And Lord Rosslyn has decided that a bequest to relations by *blood or marriage* was confined to relations entitled under the Statute of Distributions, and those who had married with them, although he said he was not sure that he hit the intention by it.(l) But upon a gift to “*my nearest relations*” there is no uncertainty, and consequently no necessity for

(e) Doe v. Over, 1 Taunt. 263.

(f) Pierson v. Garnett, 2 Bro. C. C. 38. 227. See 8 Ves. jun. 574, 575.

(g) Bennett v. Honeywood, Ambl. 708.

(h) See Clark v. Blake, 2 Bro. C. C. 320; 2 Ves. jun. 673; Doe v. Clarke, 2 H. Blackst. 329; Blackburne v. Stables, 2 Ves. & Bea. 369; Trower v. Butt, 1 Sim. & Stu. 181. See a curious decision in Nurse v. Xerworth, 3 Swanst. 699.

(i) Whithorne v. Harris, 2 Ves. 527.

(k) Gower v. Mainwaring, 2 Ves. 87.

(l) Devisme v. Mellish, 5 Ves. jun. 529.

(1) “It is now settled according to the dictates of common-sense and humanity, that a child *en ventre sa mere*, for all purposes for his own benefit, is considered as absolutely born. He takes by descent under the Statute of Distributions—is entitled to the benefit of a charge for raising portions for children—may be executor—have a guardian assigned—in executory devises is a life in being—may be vouched in a common recovery.” Per Duncan, J., delivering the opinion of the Court, in Swift v. Duffield, 5 Serg. & Rawle R. 38. [Note to 1st Am. Ed.] See also Stedfast v. Micoll, 3 Johns. Cas. 18; Marsellis v. Thalkimer, 2 Paige’s Ch. R. 35; 2 Jarman on Wills, 103, Perkin’s note (1); Pemberton v. Parke, 5 Binn. R. 601; M’Knight v. Read, 1 Whart. R. 213; Per Rogers, J., p. 220.

resorting to construction either to confine or extend a description in itself sufficiently certain. A brother, therefore, would take in exclusion of a nephew.(*m*)

7. In a case in *Peere Williams*,(*n*) the bequest was to *poor* relations, and a countess, as a relation within the limits, claimed a share, and it was decreed to her, in regard that the word *poor* was frequently used as a term of endearment and compassion, rather than to signify an indigent person; as, speaking of one's father, one often says, my *poor* father, or of one's child, my *poor* child. But the reporter treats this as a case of compassion, the countess not having a "sufficient estate to [*239] support her dignity. In a case before Lord Hardwicke, he appears to have determined, that where the bequest was to *poor* relations, it should not be confined to the rule of the Statute of Distributions, but should be extended to those that were next of kin, *and objects of charity*(*o*) although he held that this construction could not prevail where the bequest was to the *nearest* poor relations.(*p*) Sir Thomas Sewell, also, thought that the epithet *poor* was to be attended to, but he would not extend the bequest to relations beyond the limits;(*q*) and Lord Redesdale seems to have made a similar decision in the case of *Mahon v. Savage*,(*r*) where he determined, that under a bequest to *poor* relations, a person becoming rich before the distribution was not entitled. However, it was expressly decided by Lord Camden, that the addition of the epithet *poor* or *necessitous*, or the like, does not vary the case, but the will must be read as if the word denoting poverty was not in it, *as there is no distinguishing between degrees of poverty*,(*s*) which we may observe is a much better reason than that given for a similar determination in the case in *Peere Williams*. So where the bequest was to the testa-

(*m*) *Smith v. Campbell*, 19 Ves. jun. 400; *Brandon v. Brandon*, 3 Swans. 312.

(*n*) *Anon.* 4 P. Wms. 327.

(*o*) *Attorney-general v. Buckland*, 1 Ves. 231; *Ambl.* 7, cited.

(*p*) *Goodinge v. Goodinge*, 1 Ves. 231; and *Elge v. Salisbury*, *Ambl.* 70.

(*q*) *Brunsdon v. Woodridge*, *Ambl.* 507; see *Isaac v. Defriez*, *ibid.* 595. 508; and see *Carr v. Bedford*, 2 Cha. Rep. 77; and 1 Bro. C. C. 38; and *Gower v. Mainwaring*, 2 Ves. 87. 110.

(*r*) 1 Rep. t. *Redesdale*, l. 11; but read the case; and see *White v. White*, 7 Ves. jun. 423; but note, there the bequest was otherwise too remote, and void.

(*s*) *Widmore v. Woodroffe*, *Ambl.* 686; 1 Bro. C. C. 33, n.

tor's relations "fearing God and walking humbly before him," these words were rejected by Lord Cowper. And in a later case, *(t)* where it was to the relations "who were most deserving," the Master of the Rolls, said, that he had no rule of judging of the testator's relations, and could not enter into spirits, and therefore could not prefer one to another. Upon the [*240] whole, "then, there appears to be great reason to contend that the true rule is, that the epithet poor, necessitous, or the like, is merely nugatory, although certainly there is a considerable weight of authority in favour of the contrary doctrine."*(u)*

8. In an early case *(v)* of a devise to a trustee in fee, upon trust to convey to such of the relations of the testator as he should think best and most reputable for his family, the Court deemed it most reputable for the family that the heir-at-law should take it.

9. The words "most necessitous of my relations," or similar words, must receive the same construction as *poor* relations.*(x)*

10. The signification imposed on the word *relations* is for the same reason extended to a bequest to "kindred;" *(y)* and "next of kin" has likewise received the same interpretation; *(z)* but it is now decided, that upon such a gift, if there is nothing to show that the testator had reference to the Statute of Distributions, or to a division, as in the case of intestacy, the nearest in kindred only would be entitled; and that brothers and sisters would exclude nephews and neices from participating in such a bequest.*(a)*

11. A similar construction has been put upon the word "family," *(b)* although certainly that word may, according to the context, have different significations in different wills. It may be

(t) Doyley v. Attorney-general, 4 Vin. Abr. 485, pl. 16. See Cole v. Wade, 16 Ves. jun. 27.

(u) See Lewin on Trusts, 578, n.

(v) Clarke v. Turner, 2 Freem. 198. Baker v. Barret, as there stated, is not law.

(x) Widmore v. Woodroffe, ubi sup.

(y) Carr v. Bedford, 2 Cha. Rep. 77; and see 9 Ves. jun. 323.

(z) Phillips v. Garth, 3 Bro. C. C. 64.

(a) Garriek v. Lord Camden, 14 Ves. jun. 372; Smith v. Campbell, 19 Ves. jun. 400; Elmsley v. Young, 2 Myl. & Kee. 82. 780; Withy v. Mangles, 4 Beav. 358.

(b) Cruwys v. Colman, 9 Ves. jun. 319; and see Gower v. Mainwaring, 2 Ves. 110. See Doe v. Joinville, 3 East, 172.

restrained to mean only the children.(c) In one case Lord Alvanley, at the Rolls, construed it to embrace a husband of the party, although he cautiously referred his *deci- [*241] sion to the particular case before the Court;(d) and in a devise of real estate, it means, it is said, the heir-at-law.(e)

12. Lord Thurlow has justly observed, that a bequest to relations is not, under the foregoing construction, rendered totally inofficious, for the *wife* cannot claim, the statute providing for her by the name of wife.(f)

13. And as this construction is only made in the absence of evidence of the testator's intention, any express direction by him will be imperative. Therefore, where the bequest was to the relations, *equally* to be divided between them, Lord Talbot determined that an unequal distribution could not be directed;(g) and he accordingly decreed them to take *per capita*, although under the statute they would have taken *per stripes*;(h) and "share and share alike" have the same meaning as "equally to be divided."(i) So where a testator explains the meaning which he attaches to the word, his will must be attended to; as, where a testatrix gave a residue to be divided between her *relations*, that is, the Greenwoods, the Everits, and the Dows. The Everits were not within the degree of relationship limited by the statute, but they were decreed to take jointly with the Greenwoods and Dows, who were.(k)

14. But where the gift was to the wife for life, and after his death his executors were to part the same to his next relations, as sisters, nephews and nieces, although one of the living sisters had children living at the testator's death, yet as he had not enumerated them, or directed them to take *equally, [*242] the fund was directed to go according to the statute.(l)

(c) See 9 Ves. jun. 324; Woods v. Woods, 1 Myl. & Kee. 401.

(d) Mac Leroth v. Bacon, 5 Ves. jun. 156; Blackwell v. Bull, 1 Kee. 176.

(e) Wright v. Atkins, 17 Ves. jun. 255; Doe v. Smith, 5 Mau. & Sel. 126; Griffith v. Evan, 5 Beav. 241.

(f) See 1 Bro. C. C. 33.

(g) Thomas v. Hole, For. 251. See Butler v. Stratton, 3 Bro. C. C. 367; Wimbles v. Pitcher, 12 Ves. jun. 433; 2 Myl. & Kee. 793.

(h) See Oke v. Heath, 1 Ves. 135.

(i) Phillips v. Garth, 3 Bro. C. C. 64. See Elmsley v. Young, 2 Myl. & Kee. 780.

(k) Greenwood v. Greenwood, 1 Bro. C. C. 32, note.

(l) Stamp v. Cooke, 1 Cox, 234. See 2 Myl. & Kee. 787. 793.

15. It remains to observe, that parol evidence is inadmissible of the testator's intention not to confine the word *relations*, kindred, &c. It is immaterial that he knew *relations* to mean more than *next of kin*. It may, however, be shown, that the testator had relations in a particular place, and that he knew them; but the evidence cannot be acted upon in opposition to the words of the will.(m)

SECTION II.

TO WHAT RELATIONS AN APPOINTMENT MAY BE MADE.

- | | |
|---|---|
| 1. Under power of selection, statute not the guide. | 11. In default of appointment the statute rules. |
| 2. Contra under a power of distribution. | 12. Where the relations take as tenants in common. |
| 3. Where the class is nearest relations. | 15. Where the power is to select, the <i>gift</i> is to those who survive the donee. |
| 6. Harding v. Glyn. | 20. Unless the gift is immediate. |
| 7. Power includes a gift by implication. | 21. Pope v. Whitcombe: relations at death of donee entitled, although the power is to distribute. |
| 8. Although it be a power of selection. | |
| 9. Although bill filed, donee may appoint. | |
| 10. Where the power extends to representatives. | |

1. ALTHOUGH the Court of necessity restrains the import of the word *relations*, in gifts to them, yet, where a party has a power of selecting amongst *relations*, he may go beyond the rule which the Court itself adopts, when the distribution is made under its authority.(n)

[*243] *2 But unless the donee has a power of selection he can only appoint to the next of kin within the statute,(o) and therefore a power to appoint amongst the relations, and not amongst such of them as he thinks proper, will not authorize an

(m) Goodinge v. Goodinge, 1 Ves. 231. See Green v. Howard, 1 Bro. C. C. 31; Edge v. Salisbury, Ambl. 70.

(n) Harding v. Glyn, 1 Atk. 469; 5 Ves. jun. 501, stated from Reg. Lib.; Supple v. Lowson, Ambl. 729; Spring v. Biles, 1 T. Rep. 435, n.; Cruwys v. Colman, 9 Ves. jun. 319; Mahon v. Savage, 1 Rep. t. Redesdale, 111; Forbes v. Ball, 3 Mer. 437; Grant v. Lynam, 4 Russ. 292.

(o) Pope v. Whitcombe, 3 Mer. 689.

appointment to any who are not of the next of kin. In a case, *(p)* in which Lord Redesdale does not appear to have had his attention drawn to this distinction, a bequest to be distributed amongst the testator's poor relations, or such other objects of charity as should be mentioned in his private instructions, and no such instructions were left; he thought there was a discretionary power, and that all the testator's poor relations need not be included, but he rested his decision on the ground that the testator's design was to give to them as objects of charity, and not merely as relations. And in *Forbes v. Ball*, *(q)* where the gift was to the wife, and it was the testator's desire that she might dispose of the same amongst her relations as she by will might think proper, and her sister was her sole next of kin, an appointment to the sister and to her children was supported, perhaps on the ground that she had a power of selection; and, therefore, if there was only one next of kin, the power authorized the donee to go beyond the limit of the statute. The case however was not fully considered.

3. And of course where the class is defined, though the donee is authorized to exclude some, yet he must confine himself to the class. Therefore a gift to *such* of a man's nearest relations as A. shall appoint confines him to the nearest relations. *(r)*

4. The distinction, that if the donee has a power of selection the statute does not furnish the rule, has not always been attended to. In *Brudsden v. Woolridge* *(s)* *no [*244] distinction was made between two gifts in separate wills, one amongst the poor relations, and the other to such of the poor relations as A., his heirs, executors and administrators, should think objects of charity, and in such proportions as he and they should think fit. Both gifts were confined to the next of kin, although as to the latter A. was to select the objects in the distribution.

5. But in the later case of *Supple v. Lowson*, *(t)* where the trust was to pay the fund amongst such of her relations, at such

(p) *Mahon v. Savage*, 1 Scho. & Lef. 111.

(q) 3 Mer. 487.

(r) *Goodlinge v. Goodlinge*, 1 Ves. 231; *Edge v. Salisbury*, Ambl. 70.

(s) *Brunsdon v. Woolridge*, Ambl. 507; 1 Dick. 380.

(t) Ambl. 728.

times, &c. as A. in his discretion should judge proper, it was expressly decreed that A. had a discretionary power, and that he was not confined to make distribution amongst the testator's next of kin, but was at liberty to make the same amongst the testator's relations at large, as he should think proper.

6. And this point was decided in *Harding v. Glyn*, although that could hardly be collected from the original report.(u) There was what was held to be a power was a direction to the wife, who was legatee for life, to give the fund amongst such of his relations as she should approve of, and the Court held that she might, if she thought fit, include persons not next of kin, and this has been approved of by succeeding Judges;(x) and the same point, approving of *Harding v. Glyn*, was decided in the late case of *Grant v. Lynam*.(y)

7. In cases of this nature the Court considers the power one which it is the duty of the donee to execute—a power in the nature of a trust—and, therefore, although there is no express gift to the objects in default of appointment, yet the direction which gives the power is held at the same time by implication to create a trust for the objects of the power, and that although the power be one of selection.(z)

8. And the rule was adhered to in a case(a) where [245] the testator declared that it was his will and desire that a third part of his estate be left entirely to the disposal of his wife, among such of her relations as she might think proper. Sir W. Grant thought this case did not differ materially from *Harding* and *Glyn*, and *Brown* and *Higgs*. What the testator wills and desires by this clause is, that one-third of his estate shall be left entirely to the disposal of his wife, among such of her relations as she may think proper. It is to be left not to her disposal generally, but to her disposal among a particular class of persons, leaving to her to select from that class such individuals as she shall think proper. You cannot stop

(u) 1 Atk. 469.

(x) 5 Ves. jun. 501, stated from R. B.; 8 Ves. jun. 571, from Mr. Joddrell's note; and see 9 Ves. jun. 324.

(y) 4 Russ. 292.

(z) *Supra*, vol. 1, ch. 10, sect. 6; *Croft v. Adam*, 12 Sim. 639.

(a) *Birch v. Wade*, 3 Ves. & Bea. 198.

in the middle of the clause and say, all that he willed and desired was, that she should have the disposal of one-third, but that it was no part of his will and desire that her relations should have the benefit of that disposition. He thought the intention was, that her relations, at least such of them as she should designate, should have the benefit of that third.

9. The Court, where there has been no misconduct, although a bill is filed for an account and distribution, will not deprive the donee of his power of selection or distribution, although it must of course be exercised under the eye of the Court. *(b)* The Court itself will not execute the discretionary power. *(c)*

10. But even where the donee of the power takes the whole legal interest in the fund, yet, if the author of the power intended a personal discretion to be vested in the party, that discretion cannot be transmitted to his representa- [246] tives, unless they are named in the power, and precisely answer the description. *(d)*

11. If the power be not executed, the fund will, without reference to the power having been exclusive or merely distributive, be divided amongst those only who would take under a gift if no power had been created, unless a contrary intent appear in the instrument.

12. In the Attorney-general v. Doyley, *(e)* the fund was decreed, in default of appointment, to the relations, *share and share alike*. The gift was to the trustees to dispose of his real and personal estate to such of his relations of his mother's side who were most deserving, and in such manner as they thought fit; and for such charitable purposes as they should think proper. And the like decision was made in Harding v. Glyn, *(f)* where the gift was to the wife, at or before her death, to give *unto and amongst* such of his relations as she should approve of.

(b) Carr v. Bedford, 2 Cha. Rep. 77; Brunsden v. Woolridge, Ambl. 507; Bennett v. Honeywood, ib. 708; Supple v. Lowson, ib. 729; Spring v. Biles, 1 Term Rep. 435. n.; Mahon v. Savage, 1 Rep. t. Redesdale, 111; and see Gower v. Mainwaring, 2 Ves. 87. 110; Cole v. Wade, 16 Ves. jun. 27.

(c) See 5 Ves. jun. 503; Gower v. Mainwaring, 1 Ves. 87. 110.

(d) Cole v. Wade, 16 Ves. jun. 27; Walter v. Maunde, 19 Ves. jun. 424. Vide *supra*, vol. 1, p. 147. 150.

(e) 4 Vin. Ab. 486; but reported as to this point from the Register's book, 7 Ves. jun. 58, n.

(f) 1 Atk. 469, *supra*.

13. But in *Pope v. Whitecombe*, the rule, according to the report, was not followed. The testator directed his wife to dispose of his residue *amongst* his relations, in such manner as he should think fit; she made an invalid appointment, and the fund was divided amongst the next of kin *per stirpes*. But where, as in that case, the power is to give the fund *amongst* the objects, they, in default of appointment, take as tenants in common and *per capita* : (g) (1) and although the statute is the guide to the objects, yet there is no ground upon which, when the [*247] objects are ascertained, it should control* the shares in which they are to take. This appeared so doubtful that I had the Register's books searched, when it appeared that no such point was decided in *Pope v. Whitecombe*; so that the authorities are uniform. (h) There is more difficulty in coming to this conclusion in a case like *Attorney-general v. Doyley*, where there is no word tantamount to *amongst*, but upon the whole frame of the gift an intention was apparent in that case that the fund should be divided amongst the objects, and when that is ascertained equality is equity.

14. In the *Duke of Marlborough v. Lord Godolphin* (i) the power was to the wife to devise and distribute a fund, of which she was made tenant for life by her husband's will, *to and amongst such* of his children, and in such manner and proportions, as she by deed or will should appoint. Lord Hardwicke observed, that none could take as tenants in common of uncertain, though they may of unequal shares, and if there was anything in this so as to make them take as children of the testator, he should incline that they should take as joint-tenants. No words of division or distribution were made use of by the testator, but by way of reference to the division and distribution to be made by the donee of the power; so that it was part of her power only, and not distinct from her power, that imported a division between them as tenants

(g) See *Reale v. Reale*, 5 Ves. jun. 744; *Casterton v. Sutherland*, 9 Ves. jun. 445; *supra*, p. 206; *Fortescue v. Gregor*, 5 Ves. jun. 553.

(h) Appendix, No. 29.

(i) 2 Ves. 61; and see *Maddison v. Andrews*, 1 Ves. 57.

(1) In *Cole v. Wale*, 16 Ves. jun. 27, all the next of kin were second cousins, and therefore would have taken under the statute *per capita*.

in common. But this has been overruled by the current of authorities.

15. Where a life interest is given by will to a party, with a power to select the relations, that is, to such as he shall appoint, it is firmly settled that, in default of appointment, the persons entitled are not the relations living at the testator's death, but those who are living at the death of the donee of the power.

16. In the *Attorney-general v. Doyley*,^(k) the property was given to trustees for A. for life, and then to [*248] her issue; but in case of a certain failure of issue, the trustees were to dispose of a portion of the estates *to such* of his relations, &c., who were most deserving, and in such manner as they thought fit. The event happened, and the power having become incapable of being exercised, the Court gave the fund to the relations, excepting only those that were beyond the third degree: and the Master of the Rolls held, that there should be no representation of those relations who died in the lifetime of A., for, before her death no part thereof vested in any of the relations, and it was contingent whether they would be entitled thereto or not.

17. The point where the donee had only a life interest was decided four years later, in *Harding v. Glyn*. Lord Eldon says the question in that case was, was the property undisposed of which she did not give to any one? If so, of necessity it would have gone to those who were next of kin at the death of the testator, or the representatives of any who died in the life of the wife. But the Court seems to have considered that there was a duty imposed upon the wife, and that a latitude was to be given to enable her to discharge the duty according to the power. Then having the power of naming during her whole life, the Court said, those relations who were relations at her death were to take. That could not be, because they were strictly *cestuis que trust*; but as those to whom she might have given the instant before she died, were those to whom she ought to have given.^(l)

18. So where the power was to a tenant for life to give the

(k) 4 Vin. Abr. 485.

(l) 8 Ves. jun. 572, 573. See 19 Ves. jun. 426, which, if correctly reported, shows that Lord Eldon for the moment forgot the rule.

fund to her own family, the relations were held to be entitled in default of appointment, that is, the next of kin of the donee. The same person happened to be next of kin of both the testator and the donee. That, Sir W. Grant observed, made no difference [*249] in the case, for according to *Harding v. Glyn*, where a power of selection is given in favour of the testator's own relations, and that power is not exercised, the property undisposed of will go to the next of kin at the death of the party who had the power. Therefore, if even this had been a trust for the testator's family, it would have been for such as were next of kin at the donee's death: so either way the claimant was entitled to the whole of the property.(*m*)

19. Again, in *Birch v. Wade*,(*n*) the gift by will was to trustees, for the wife for life, and after her death in thirds to his brother and two sisters for their lives; after the death of his brother and one of his sisters he gave the third of each to their children; and as to the other third of the principal, it was left to be to the disposal of his wife among such of *her* relations, as she might think proper, after the death of his sisters. It was held, as we have seen, that this was a power in the nature of her trust, and her relations living at her death were decreed to be entitled, though there was no selection made by her.

20. But where the gift was in effect immediate, although a period was allowed within which to vest the property in the relations; the distribution not being suspended by the existence of any preceding estate for life, those who were to take in default of appointment were held to be such as answered the description of next of kin at the testator's death.(*o*)(1) The point, however, does not seem to have arisen in the case, as the same persons appear to have been the next of kin at the time of the testator's death, and when the decree was pronounced, which was after the power had ceased.(*p*)

(*m*) *Cruwys v. Colman*, 9 Ves. jun. 319; see *Ray v. Adams*, 3 Myl. & Kee. 237.

(*n*) 3 Ves. & Bea. 198.

(*o*) *Cole v. Wade*, 16 Ves. jun. 27; *Walter v. Maunde*, 19 Ves. jun. 424.

(*p*) See 16 Ves. jun. 31.

(1) As to the claim of the representatives of a poor relation, where the gift is in the nature of a charity, see *Mahon v. Savage*, 1 Scho. & Lef. 111.

21. In the later case of *Pope v. Whitcombe*, (q) the fund "was given by will to the wife for life, and then in [*250] a certain contingency the testator directed her to dispose of the residue amongst his relations as she should think fit: the wife having made an invalid appointment, it was insisted that as the wife had only a power to vary proportions, the property vested in the testator's next of kin at his death. The cases in favour of the next of kin at the death of the wife apply only, it was said, where a power of selection is given, and the person to whom that power is given dies without having exercised it: but here the interest vested. The Court, it is said, was clearly of that opinion, and decreed accordingly, although the decree, as stated in the report from the Register's book, does not show that *this* point was decided. (1) No judgment is given, and the case is erroneously reported, as we have seen, upon another point.

22. Whilst the power exists there seems no sound distinction between the cases. The period of vesting seems to depend rather upon the cesser of the power by the death of the donee without exercising it, than upon the right of the donee to make a selection amongst the relations; for where the power is to select, yet the gift is not by implication to those whom he might have selected, but to a more confined class, and this class might be held to take, subject to be defeated by the power, but that is properly concluded by the authorities. So where the power is simply to distribute, yet the death of an object in the life-time of the donee would enable the donee to appoint to the surviving objects: so that the donee here may appoint to a more confined class than would take in default of appointment.

23. Since these observations were written, the Register's book and Minute book have been searched for me, which "agree with each other, but do not agree with the state- [*251] ment in the report. It appears by the decree that the whole fund was given to the personal representatives of John

(q) 3 Mer. 689.

(1) And see *Hinds v. Hinds*, 1 Term Rep. 437, n., which is not an authority, if correctly stated. See 3 Bro. C. C. 69. The decree was of course to secure the fund; but the question, who was entitled in default of appointment, could not be decided until the widow's death.

Childe, the next of kin of the testator living at the widow's death. The testator's next of kin, therefore, who were living at his death, but who died in the widow's lifetime, were excluded ; and Sir W. Grant's decree confirms the rule instead of breaking in upon it. (r) There appears, therefore, in this respect to be no distinction between a power of selection and a power of distribution.

(r) Appendix, No. 29.

*CHAPTER XV.

[*252]

OF A POWER TO APPOINT TO CHILDREN.

SECTION I.

OF THE OBJECTS WHO ARE WITHIN THE POWER.

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| <p>2. Grandchildren not included.</p> <p>7. <i>Brudenell v. Elwes</i>.</p> <p>10. Where a contingent gift over to grandchildren does not affect the previous gift to a child.</p> <p>14. Power to advance on marriage for the benefit of the children, authorises a strict settlement.</p> <p>15. No appointment authorized to executor of a deceased child.</p> <p>16. But with the child's privity a strict settlement is valid.</p> <p>17. Although the power is not referred to.</p> <p>19. So first an appointment, and then a settlement by agreement.</p> <p>20. Such a settlement is voluntary.</p> <p>24. A child in ventre sa mere is a child living.</p> | <p>25. Where children of a second marriage not entitled.</p> <p>26. Where confined to children living at donee's death.</p> <p>28. Where issue means children.</p> <p>29. How a power to appoint to heirs of the body may be executed.</p> <p>32. <i>Jesson v. Wright</i>, with observations.</p> <p>33. A younger child becoming eldest loses his right.</p> <p>35. Where the eldest child is considered as a younger one.</p> <p>37. Change of character must be before portions paid.</p> <p>39. Power to appoint to nephews does not include great-nephews.</p> |
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1. It is upon the power of which I am now to treat that by far the greater proportion of cases arises. As we have already discussed, perhaps sufficiently, the general doctrine in regard to the estates which may be created under powers, I shall here only consider, 1st, to whom an appointment may be made under a power to appoint to children. And, 2ndly, In what manner the fund may be settled upon them, merely premising that an indefinite power in words may, upon the whole instrument taken together, be confined to *children.(a) And lastly, I [*253]

(a) *Bristow v. Warde*, vide supra, vol. 1, p. 530.

shall consider the construction of a power to raise portions for children.

2. First then, It is now established that a power to appoint to children will not authorize an appointment to grandchildren.(b)(1)

3. In the case of *Doe* on the demise of the Duke of Devonshire v. Lord George Cavendish, a contrary opinion was in effect delivered, although it was pronounced on the particular circumstances of the case. The case was shortly this: Lady Burlington devised freehold estates to the use of the Duke of Devonshire for life remainder to trustees to preserve, remainder "to the use of such of his child or children by his late wife, for such estate and estates, and in such shares and proportions, and under and subject to such powers, provisoes, conditions, restrictions or limitations as he should appoint;" and in default of appointment, to all the child or children of the Duke by his wife, as tenants in common in tail, with cross-remainders between them in tail, with remainder to the Duke in fee. He exercised the power by limiting the estate to his two younger sons for life, with remainder to their issue in strict settlement, with a power to make jointures, &c. In the view that was taken of the case it was not necessary to decide the point, but the Court gave an extra-judicial opinion upon it.(c) They said there were three grounds from which they were of opinion that this was a good execution: 1st, From the subject-

(b) *Alexander v. Alexander*, 2 Ves. 640; *Bristow v. Warde*, 2 Ves. jun. 336; *Whistler v. Webster*, ib. 367; *Smith v. Lord Camelford*, ib. 698; *Crompe v. Barrow*, 4 Ves. jun. 681; *Adams v. Adams*, Cowp. 651; *Brudenell v. Elwes*, 1 East, 442; 7 Ves. jun. 382; *Butcher v. Butcher*, 9 Ves. jun. 382; *Hewitt v. Lord Daere*, 2 Kee. 622; *Doe v. Welford*, 12 Adol. & Ell. 61.

(c) 4 Term Rep. 744, n.

(1) *Morris et ux. v. Owen et ux.* 2 Call's R. 520. *Hudson v. Hudson's Adm's* 6 Munf. R. 352, pl. 3.—[Note to 1st Am. ed.]

See also *Drayton v. Drayton*, 1 Desauss. R. 327. *Dereaux v. Barnewell*, 1 Desauss. R. 439. *Izard v. Izard*, 2 Id. 393. *Smith v. Case*, 2 Id. 123, and note. *Tier v. Pennell*, 1 Edw. N. Y. Ch. 354. *Hone v. Van Shaiick*, 3 Id. 474. *Marsh v. Hague*, 1 Id. 174. *Mowatt v. Corow*, 7 Paige's Ch. R. 328. *Cutter v. Doughty*, 23 Wend. R. 522. *Hallowell v. Phipps*, 2 Whart. R. 376, and authorities cited in the arguments of counsel, p. 379. *Pemberton v. Parker*, 5 Binn. R. 601. *Dickinson v. Lee*, 4 Watt's Rep. 82. 1 Jarman on Wills, 70, Perkins's note(1). 4 Kent's Com. 345 and notes, 5th ed., and note ante p. 236, and authorities cited.

matter of the power ; 2dly, From the limitations over for want of appointment : 3rdly, From the words in which the power was created. 1st, This was not money, not to be turned into money, nor portions. It was 'a limitation of a [*254] family estate, how it should go after her death. She considered how it should go, being determined that it should go amongst grandchildren. Suppose she had only said, at the time of making her will, that she meant it to go to the grandchildren, it must have been inquired, whether absolutely, or in strict settlement : if so, her answer must have been, "in strict settlement." There are two kinds of settlement, one by which the issue of the person to whom the first limitation is made shall certainly take, by giving the first taker only an estate for life, the other by creating an estate tail in the first instance. But then there is a trick in law, by which, when the issue arrive at twenty-one, the entail may be barred. If this had been represented to Lady Burlington, her answer would have been, that she was sorry for it, as it might be a mean of defeating her purpose : but then it would be answered to that again, that there was a trick against that, to make a strict settlement. That was meant ; but to guard against all events, she said, "I will put the father in my place, and give him authority, if he choose to execute it." If the words "in strict settlement" had been used, nobody could have doubted her meaning. Now all the words in the language, except those, are used to carry this power as far as possible, and to show that she meant an appointment in strict settlement. Whatever he might do with his own estate he might do with this ; that was her intention, only that the children were the objects. What is the use of powers ? It implies a strict settlement, with power to make jointures, leases, and raise portions.

4. Upon the foregoing decision it need simply be remarked, that, as to the first ground, it can at most only go in aid of the construction upon the words of the power itself ; that the second ground bears against the construction of the Court, as the estate was, in default of appointment, given amongst the children in tail, so that they might acquire the fee, and their issue could only take through them, and not as purchasers ; and that in regard to the *third ground, the objects were the child [*255] or children, and the general words are merely those

which are usually inserted by conveyancers, with a view to the interests to be given to the objects designated, and not with an intent to extend the power by implication to objects not named in it, nor will the words bear a contrary construction, consistently with the decided cases. *(d)*

5. The same point arose in *Griffith v. Harrison*. *(e)* By one codicil an estate, part freehold and part copyhold, was given to his wife for life, and after her decease, "to such *child or children* of him, the devisor, as she should judge most proper to bequeath the same to." By a later codicil he gave the estate to his wife for life, and empowered her to devise the same to any one or of his *child or children*, in such manner, share, and proportion as she should appoint, but *so as the said estate should not be divided but transmitted whole and entire to his heirs*. And he gave the reversion of an estate adjoining to the other in like manner, and declared that the two estates should be considered *as one estate, and be transmitted entire to his family*. In default of appointment he gave the estate to his own right heirs. The widow appointed the estate to her eldest son for life, remainder to trustees to preserve, remainder to his children in strict settlement, in the usual way, with like limitation to her other children and their issue. The Court of King's Bench were equally divided in opinion: *(f)* Lord Kenyon and Mr. Justice Grose were of opinion that the children were the only objects, and that the whole execution of the power must be exhausted upon them. The execution which the wife had attempted took in persons who were not children of the testator, and affected to make them purchasers, and was not only not warranted by the power, but might [*256] give a descendible quality to the estate to "persons out of the testator's views, viz. to the heirs *ex parte materna* of the children of the sons, and *ex parte paterna* of the children of the daughters. But they thought that in favour of the general intention, the children might be held to take estates-tail.

On the other hand, Ashurst and Buller (who were Judges of

(d) See this case more fully observed upon in Powell's note to Fearn's *Ex. Dev.* p. 349.

(e) 3 Bro. C. C. 310.

(f) 4 Term Rep. 737.

B. R. when the Duke of Devon's case was decided) certified that the first son took for life only. They prefaced their opinion with a declaration that the intention of the person creating the power is to be the guide in the construction of it, and that a settlement upon a child for life, with remainder to his children in strict settlement, is, in common parlance, a settlement on the child. They then examined the words of the power, which they thought tantamount to a power to limit the estate "in strict settlement;" and they relied on the Duke of Devonshire's case, as in point. But if a strict settlement was not authorized then, as the estate was to be transmitted entire, they thought that the only way of making the different parts of the power consistent was to consider the word "heirs" as applicable only to more remote descendants than the children, and to confine the wife's power of appointment to the children during their lives only, in which case, after their deaths, the estate would go entire to the right heir of the testator.

6. If the rule attempted to be established in the Duke of Devonshire's case, and by Ashurst and Buller in the last case, were to prevail, it would certainly amount to this, that every power of appointment to *children*, in which the general words *manner, share, proportion, &c.* are thrown in, extends to grandchildren. Now it is incontrovertibly settled that grandchildren are not objects within a bare power to appoint to children, and it would be highly mischievous if this broad rule were to be cut down by a minute inquiry in every case, whether there are not words in the power tantamount to "strict settlement," so as to embrace grandchildren according to the *supposed* intention.

*7. But we may fairly consider the principle upon [*257] which the extra-judicial opinion delivered in the Duke of Devonshire's case was founded as completely overruled. They received a severe shock from the certificate of Lord Kenyon and Mr. Justice Grose in Griffith and Harrison. And in a subsequent case, which it is impossible to distinguish from the Duke of Devonshire's case, the Court of King's Bench, and afterwards Lord Eldon, held that the power did not authorize a limitation to grandchildren, notwithstanding that the usual words "in such parts and proportions, and for such estate and estates, and with

and under such charges, provisions, conditions, and limitations," were inserted in the power.(g) In a case which arose since Lord Kenyon's death, Mr. Justice Lawrence observed, that the Duke of Devonshire's case was one that would not rule any other, at least not exactly similar. That he had heard Lord Kenyon express that opinion of it :(h) and neither Lord Thurlow(i) nor Lord Alvanley appears to have considered the case as of much authority.(k)

8. If the case of *Brudenell v. Elwes* is to be treated as a binding authority, a power, in the precise words of that in the Duke of Devonshire's case, must now be held to extend to children only. It would be idle to attempt to distinguish the cases: the powers are nearly word for word the same:

Duke of Devonshire's case.

Brudenell v. Elwes.

"To the use of such his child or children by Charlotte Lady Cavendish, his late wife, for such estate and estates, and in such shares and proportions, and under and subject to such powers, provisoes, conditions, restrictions, or limitations as he shall, by deed, &c. nominate, direct, limit, or appoint."

"To the use of all or any the child or children of the body of J. C. on the body of Louisa his wife lawfully begotten and to be begotten, in such parts or proportions, and for such estate and estates, and with and under such charges, provisions, conditions, and limitations, as they should by any deed, &c. direct, limit, or appoint."

[*258] 9. The Duke of Devon's case was a settlement upon the children by a late wife, and although the settlement in *Brudenell v. Elwes* was in pursuance of articles before the marriage, yet it was not executed until *after* all the children were born. In both cases, consequently, at law grandchildren were capable of taking in remainder after the children as purchasers, if the power authorized an appointment to them. Upon this point, therefore, there is no distinction between the cases, and *Brudenell v. Elwes* was decided upon the general rule.

10. Where a power to appoint to children was exercised in favour of the children in fee over different portions of the estate.

(g) *Brudenell v. Elwes*, 1 East, 442; 7 Ves. jun. 382. •

(h) See 2 East, 381, n.

(i) *Lowson v. Lowson*, 2 Bro. C. C. 26, cited; and see *ibid.* 29.

(k) See 4 Ves. jun. 684.

with a declaration that the marriage of his children should be with the privity of the trustees; and in case his son should marry without such consent before he attained twenty-five, then he should be entitled for life only, and to the issue of his body lawfully begotten, in such shares and proportions as he should by will or deed direct or appoint: the Judges of the King's Bench held, that the appointment to the son in fee remained unaffected by his marriage before twenty-five without the privity of the trustees.⁽¹⁾ The power was confined to children and could not be extended to grandchildren, and the proviso moreover would have infringed the law against perpetuity, if the unborn son had been made tenant for life, with remainder to his issue, as purchasers.

11. So where(*m*) under a power to appoint to children the father appointed to them absolutely, and then declared that she share of each of his daughters in the fund appointed was so appointed, and he hereby as far as he lawfully or equitably might or could, ordered and appointed that the same should be held by his trustees, upon the trusts declared of the share of each daughter in his residuary personal estate; and those trusts were

• for the daughter's separate inalienable *use for life, [*259] and after her decease for her children, as she should appoint, and in default of appointment to them equally, and in default of such children as the daughter should appoint, and in default of such appointment to her next of kin: the Master of the Rolls held, that the words of appointment were sufficient to vest the shares absolutely in the daughters; that the attempt to restrict their interest by limitations to their issue being inoperative, did not cut down the absolute appointment, but that it was competent to the donee of the power to limit the interests which he appointed to his daughters to their separate use, and to restrain them from anticipation or alienation: (*n*) and he held that there was no case of election.

12. In the case of *Mallison v. Andrews*, a power was given to a woman to dispose by deed or will of 1,300*l.*, to such of her children, in such manner and form, *and to such uses and purposes*, as she should appoint. She gave a part to one child for life, and

(1) *Busby v. Salter*, 27 Nov. 1788; 2 *Prest. Abstr.* 164.

(*m*) *Carver v. Bowles*, 2 *Russ. & Myl.* 301.

(*n*) Put us to this point, vide *supra*, vol. 1, p. 200.

after her decease the principal to be divided among her children. And under the very full words of this power the appointment, it is said, was held to be well made.(o)(I)

13. But, even full as these words were, yet, unless the words "and to such uses and purposes," were considered as an independent clause authorizing an appointment even to strangers, which perhaps can hardly be contended, the case it [*260] "should seem, cannot stand consistently with the later determinations.

14. In *Alexander v. Alexander*, after giving a power of appointment in favour of his children to his wife, the testator directed that if she should think fit to apply in her lifetime any part of the fund for their better advancement, in marriage or otherwise, in the world, then the trustees should pay such part of it, *for the benefit of such children*, as his wife should appoint. Sir Thomas Clarke thought that the power would have enabled the mother, for better advancement in marriage, to make *a strict settlement*.(p)

15. Where a child dies without any appointment having been made to him, no part can be appointed to his executor or administrator;(q) and indeed, as we have seen, an appointment may be made to the surviving children or child; so as to exclude the representatives of the deceased child from taking any share under a gift in default of appointment.(r)

16. But it is settled, that in equity a valid appointment may be made to persons not objects of the power, with the approbation of the real object of the power. Therefore, if upon the marriage of

(o) 2 Bro. C. C. 26, n.; Chan. Hil. 1782.

(p) 2 Ves. 640. In citing this case, Mr. Justice Buller appears to have overlooked this power; see 2 Term Rep. 253.

(q) *Maddison v. Andrew*, 1 Ves. 57; see *Martin v. Swannell*, 2 Beav. 249.

(r) *Boyle v. The Bishop of Peterborough*, 1 Ves. jun. 299. See 1 Ves. & Bea. 91.

(I) Most of the cases in the notes to *Brown* are inaccurately reported. This case is introduced as a note of a case cited in the argument of *Robinson v. Hardeastle*; but it is evident that the case intended to be cited was *Maddison v. Andrew*, in 1 Ves. 57; and there appears to be reason to suspect, from the striking similarity of the names, that the case of *Mallison v. Andrews* is merely an inaccurate statement of the former, or that that case has been confounded with some other. I could not discover the case referred to by *Brown* in the Register's book. There is a case in 1782, *Mallison v. Nesbitt*, but that turned upon a very different question, Reg. Lib. B. 1781, fol. 388. There is also a case of *Mallison v. Robinson*, *Archdale*, and others, which was a petition by a tenant for life under a will, and the question could not arise in that case, Reg. Lib. B. 1782, fol. 66.

a child, the parent, by the marriage settlement, under a power to appoint to children, appoint to the issue of the marriage, the appointment would be supported in equity, not as a good appointment to the issue of the marriage, but as an appointment to the child *himself*, and a settlement of it by *him* :(*s*) nor is it essential that such a settlement should be made upon marriage. The principle is, that the act operates first as an appointment ; *and secondly, as a settlement by the appointment of ['261] personalty to the children of a married daughter, who is herself the object of the power, is valid if made with the concurrence of the husband.(*t*) for a husband can dispose of such property of his wife in expectancy against every one but the wife surviving.

17. And a settlement on a child and her husband, and their issue, in strict settlement, was supported in equity, as the child was an assenting party to the settlement, although the power was confined to children ; and so far from the power being referred to, the donee (who was the original settlor) recited that he was seised in fee, and conveyed as owner, and there was no evidence that the child was aware of the existence of the power. This is the case of *Wade v. Paget*, and, strong as the circumstances are, the decision, in the absence of fraud, appears to be right.(*u*)

18. But the mere circumstance of the child being made a party to the deed, and not executing or assenting to it, will not be sufficient.(*x*)

19. An appointment first to the child, and then a settlement by the child, *in consequence of an agreement with the father before the appointment*, upon himself (the child) and his children (not objects of the power,) with provisions, by way of annuity, for objects of the power, have been held valid.(*y*) There was a provision also for costs. It was insisted that the settlement was a fraud upon the power. But *Alexander, C. B.*, held otherwise. The former cases, he thought, were infinitely stronger than the

(*s*) *Routledge v. Dorril*, 2 Ves. jun. 357; *Langstone v. Blackmore*, Amb. 289; *West v. Berney*, 1 Russ. & Myl. 431; *Thompson v. Simpson*, 1 Dru. & War. 459; *Goldsmid v. Goldsmid*, 2 Hare, 187.

(*t*) *White v. St. Barbe*, 1 Ves. & Bea. 399.

(*u*) 1 Bro. C. C. 364.

(*x*) *Brudenell v. Elwes*, 7 Ves. jun. 382; *Tucker v. Sanger*, M'Clell. 424.

(*y*) *Tucker v. Tucker*, 13 Price, 607.

present, being cases of appointment under a power, made on contract before execution, to persons not objects of the power, [treating them as operating] through and by means of [*262] appointing to persons who were: in both which *cases the powers were held to be well executed, because it was considered that those appointments might have been made in the manner in which this very appointment was made. He observed that it was ingeniously argued that in this case the other objects of the power having had annuities given to them by the appointor, to be paid by the appointee, had an interest in the estate appointed, which might be defeated by the incumbrances with which the appointee might charge the estate in the short interval during which he was seised of the fee by the effect of the conveyances making the appointment; but the answer to that was, that the appointor might have given the whole fee absolutely to the appointee, without taking the least notice of the other objects of the power: and he considered the annuities as part of the appointment.

20. In a subsequent case, upon the validity of the settlement made after the appointment as against creditors.(z) the learned Judge said he had reconsidered the principles on which he proceeded in the former case, and he saw no reason to depart from them. It appeared to him the line he took was the necessary result of what had been done in the former cases. In all those cases interests were given in form by the donee of the power to grandchildren, who were not objects of the power, because the person who was the proper object of the power, and to whom the whole might have been appointed, was a party to the deed and concurred in the gift. It appeared to him that in those cases such persons as were not proper objects of the power must have been considered as taking by and from the person who was the proper object of the power. He could view the settlement, therefore, as a voluntary settlement only so far as it gave interests to his own children. It was not contended that the small provisions by the settlement for the other objects of the power were invalid.

21. This decision proves that the settlement is the [*263] act of *the object of the power, not made upon a con-

(z) *Cutten v. Sanger*, 2 Yo. & Jerv. 459.

tract with the donee of the power, but voluntarily proceeding from himself, and cannot be sustained as a settlement for valuable consideration, except so far as the persons claiming under it can establish a sufficient consideration for it, to protect it against either creditors or purchasers. There was more difficulty in *Tucker v. Tucker* than in the early cases upon this point. For where the settlement is considered as made by the direction of the object of the power, it is virtually his sole act; but where, as in *Tucker v. Tucker*, it is made by the object of the power in pursuance of a contract with the donee of the power, the case presents some difficulty.

22. The provisions in favour of other objects of the power in pursuance of the contract with the appointor, would of course be sustained against all claiming under the settlor, because they are considered as having been appointed by the donee of the power himself.

23. Hitherto we have seen that children only are objects of the power: but it still remains to inquire *what* children come within the scope of the power.

24. A power to appoint to children *living* at the parent's decease includes a child in *ventre sa mere* at that time. (a) This point has been otherwise decided; (b) but the law is now perfectly settled. (c) (1)

25. In *Coleman v. Seymour*, (d) a man gave 3,000*l.* to a married daughter for the use of her younger children, to be distributed amongst them as she should appoint; and Lord Hardwicke determined, that the gift did not extend to her children *by a second marriage; and he was of opinion, that it [*264] extend only to children living at the making of the will or at the farthest at the death of the testator. This question, however, seldom arises upon powers, because generally an interest

(a) *Beale v. Beale*, 1 P. Wms. 244.

(b) *Pierson v. Garnet*; *Cooper v. Forbes*, 2 Bro. C. C. 38. 63.

(c) *Clarke v. Blake*, 2 Bro. C. C. 320; S. C. nom. *Doe v. Clarke*, 2 H. Blackst. 399; and see *Thellusson v. Woodford*, 4 Ves. jun. 226. See also *Hale v. Hale*, Prec. Cha. 50.

(d) 1 Ves. 209. See *Crowe v. Odell*, 1 Ball. & Beatty, 449.

(1) See note (1) ante, p. 238.

for life in the fund is given to the parent, with remainder to his unborn children, as he shall appoint, in which case it is clear that the power embraces all the children. This is the case of every common marriage settlement.(e)

26. In a late case.(f) where a fund was given to A. for life, and *at her decease* to divide it in portions as she shall choose to her children, it was held that the children of A. living at her death were the only objects of the power, and of the gift by implication in default of the execution of the power.

27. And where a power is confined to such children as shall be living at the time of the death of the donee of the power, although the power is authorized to be executed by deed or will, yet a child to become entitled under an appointment must by surviving the donee, live to answer the description of the objects.(g)

28. In a case(h) where by marriage articles a fund was agreed to be settled after the deaths of the husband and wife, to go to *the issue of the marriage*, in case there should be any living at the death of the survivor of the parents, as the husband should appoint; and in default of appointment then to *such issue* equally, and if but one, the whole to go to *such only child*; and in case there should not be *any issue of the marriage* living at the death of such survivor, then the fund to go as the husband should appoint:—issue was held to mean children only, and [265] therefore an appointment by the father under the last power in the articles was supported, as the only child of the marriage had died in his lifetime, although such child had left issue behind him.

29. Where a power is given to a man to appoint to the heirs of his body, it will not, we have seen, prevent him from taking an estate-tail if the general intent can be collected to give him such an estate:(i) but still the power, it is apprehended, may be exercised amongst any of his issue within the line of perpetuity.

30. A devise of all the testator's estate to his son and his chil-

(e) See *Baldwin v. Carver*, Cowp. 309; *Hughes v. Hughes*, 3 Bro. C. C. 355.

(f) *Kennedy v. Kingston*, 2 Jac. & Walk. 431.

(g) *Bielefield v. Record*, 2 Sim. 354.

(h) *Swift v. Swift*, 8 Sim. 168.

(i) *Doe v. Jesson*, 2 Bligh. 1; *Doe v. Goldsmith*, 7 Taunt. 209; 2 Marsh. 517. See *Lees v. Mosley*, 1 You. & Coll. 589; *Martin v. Swannell*, 2 Beav. 249.

dren lawfully to be begotten, with full power for him to settle the same or any part thereof, by will or otherwise, on them or such of them as he should think proper, *and in default of such issue*, to his son and daughter equally. Lord Alvanley observed, in delivering the opinion of the Court, the power given to the son to settle the estate on such of his children as he should think proper was mainly relied upon, and contended to be inconsistent with a devise of an estate-tail to the son himself. It was argued that the power would be altogether unnecessary if an estate-tail were already given, since it would be in the power of the tenant in tail to dispose of the whole estate in such manner as he should think fit by cutting off the entail. But it may be observed that the power had some operation, since it enabled the devisee to dispose of the estate to his *children* without going through the forms of a recovery. (*k*)

31. In *Doe v. Goldsmith*(*l*) where the devise was to the son for life, and after his decease to the *heirs of his body* to be begotten, in such shares and proportions, manner and form, as his son, by will or deed should appoint, and in default of such heirs of his body, then immediately after his, the son's, decease to another son in fee; it was held that the first devisee [*266] took an estate-tail. Gibbs, C. J., in delivering judgment, observed, that the argument was, that the words heirs of the body could not have their usual signification here, but must mean *children* of the son; for that when the testator devised to the heirs of the body of the son, in such shares as he shall appoint, that is a gift to persons who must be *in esse* when the son was to appoint to them; that the default of such issue must therefore be a default of such persons who could only be the children; and that the testator by this expression therefore manifestly meant to refer to the same persons who were to take as tenants in common under the appointment, not as the heirs of the body of the first taker in the ordinary legal sense. There certainly was much obscurity in the will, and if the Court were compelled to conjecture what the testator meant, possibly they would not wholly succeed. Without clearing up these difficulties, the Court, upon the general intent, held that an estate-tail passed.

(*k*) *Seale v. Barter*, 2 Bos. & Pull. 485.

(*l*) 7 Taunt. 202; 2 Marsh. 517.

32. In *Jesson v. Wright*,^(m) the devise was to A. for life, and after his decease unto the heirs of the body of A. issuing, in such shares and proportions as he by deed or will, &c. should appoint, *and for want of such appointment*, to the heirs of the body of A. issuing, share and share alike, as tenants in common, and if but one child, the whole to such only child, and for want of such issue, to the testator's right heirs; and A. was held, in the House of Lords, to be tenant in tail.⁽ⁿ⁾ It was argued in favour of that construction, that it was impossible to contend that William, under this power, might not have appointed an estate of inheritance to a grandson or more remote issue born in his lifetime. This, it was said, the rule of perpetuity forbade. It might be ad-

mitted that he could not appoint to a child, with re-
[*267] mainder to the issue of that child, to take as a *purchaser;

but where, as in this case, the power is to appoint to heirs of the body, a class of unborn persons, as purchasers, it may be exercised by appointing in the first instance to a grandchild as a purchaser. The rule of perpetuity forbids only a possibility upon a possibility, as an appointment to an unborn son, with remainder to an unborn son of the son. Appointments to grandchildren as purchasers under powers in marriage settlements are of every day's practice. It was immaterial that in this view the children, &c. must take by purchase; that must be of necessity; they could not take under William by an exercise of the power. Lord Elton, C., here observed, that as to the distribution under the power, although the words heirs of the body, in a legal construction could apply to one person only, it might be contended, where a power was given to appoint to heirs of the body, that it meant a class of persons. The argument then proceeded to prove that William took in tail. A devise to A. and the heirs of his body; of course A. takes an estate-tail. A similar devise with a power to A. to appoint to any one of the heirs of his body: Is it possible to contend that this right to defeat the estate so given to him, and to make those take by purchase who, if the power remained unexercised, would take by descent, can vary the construction of the devise in tail? The

(m) 2 Bligh, 1. See *Willeox v. Bellaers* Turn. & Russ. 491.

(n) See the printed reasons for the appellant, which were drawn by the Author immediately after the decision in the King's Bench.

supposed case was not different in principle from that before the Court. In the one the estate-tail was given in the first instance, but defeasible by an exercise of the power; in the other the limitation followed the power. It was immaterial whether it preceded or followed. In the former case the children would take by purchase when the power should be executed in their favour. If the power remained unexercised the heirs of the body would take by descent. So in this case, if the power was exercised, the heirs, being appointees, take by purchase; if no appointment was made, the estate would descend to the heir, to whom it is limited; and the cases of *Seale and Barter* and *Doe and Goldsmith* were relied upon. The Lord Chancellor *ob- [*268] served, that the argument supposed that the donee might appoint among grandchildren, &c. to the remotest posterity. That he should have thought impossible if he had lived two hundred years ago; to which the counsel replied, that, keeping within the rule of perpetuity, the donee might have appointed to any the remotest heir of the body.

On the other side it was argued that children only were intended to take. Heirs of the body could not here consistently mean all generations of issue, as in case of an estate-tail. The donee of the power could not have appointed so as to give indefinitely to his issue for ever. William could not have appointed to his grandson, great-grandson, &c. The clear intent was that he should limit to the children living at or before his death. Could he pass by the existing generation and appoint to a future descendant, however remote? That was forbidden by the law against perpetuities.

Lord Elton in ultimately giving his opinion observed, that heirs of the body mean one person at any given time, but they comprehend all the posterity of the donee in succession. William therefore could not, strictly and technically, appoint to heirs of the body. It had been powerfully argued that the appointment could not be to all the heirs of the body in succession for ever, and therefore that it must mean a person or class of persons to take by purchase; that the descendants in all time to come could not be tenants in common; that heirs of the body in the gift, in default of appointment, must mean the same class of persons as the heirs of the body among whom he had before given the power to

appoint: and inasmuch as you here find a child described as an heir of the body, you are therefore to conclude that heirs of the body mean nothing but children. Lord Redesdale said that in other cases a similar power of appointment had been held not to overrule the legal sense of words of settled meaning. The Court, it will be observed, did not give any opinion to what extent the power might be exercised; but as the arguments and the opinions of the Judges throw great light upon the subject, the [*269] *author thought they would be acceptable to the learned reader.

33. Where the estate is settled on the eldest son, and subject to that a power is given of appointing portions to the younger children, a younger child who becomes the eldest before receiving his portion is not within the power: (o) but he must become an eldest or only son in the sense of the settlement, although not fully expressed, to exclude him from a portion; that is he must take the estate provided by the settlement for the eldest or only son. (p) So where a power was given to appoint a sum amongst younger children, provided that the eldest son, or the son possessing the estate should have no share of it and an appointment was made, *nominatim*, to Anthony, the second son, and the other younger children, and after the appointment Anthony became the eldest son by the death of his elder brother, and the estate descended upon him, Lord Thurlow held that Anthony could not take any part of the fund, although the appointment was not revoked. (q)

34. But in a case where provision was made by a private act of Parliament for an eldest son, and a power was given to the father to appoint a sum amongst his younger children, "Stephen, Martha, and Catherine," and Stephen, by the death of his elder brother, became entitled to the provision made for the eldest son, and then the father appointed a considerable sum to Stephen under his power, Lord Talbot said this case arose upon an act of Parlia-

(o) *Chelwick v. Dolman*, 2 Vern. 528; *Lord Teynham v. Webb*, 2 Ves. 198: vide *supra*, ch. 11, sect. 2; and see *Lady Lincoln v. Pelham*, *Bowles v. Bowles*, *Leake v. Leake*, 11 Ves. jun. 166. 177. 477; *Savage v. Carroll*, 1 Ball & Beatty, 265; and *Matthews v. Paul*, 3 Swanst. 328; *Peacock v. Pares*, 2 Kee. 689.

(p) *Spencer v. Spencer*, 8 Sim. 87.

(q) *Broadmead v. Wood*, 1 Bro. C. C. 77.

ment, in which the intent shall prevail against the very words, but then the intent must be plain and clear. Now Stephen was indeed called a younger child in the preamble, but when the power was given, it was not to appoint amongst the younger children generally, but to *Stephen, Martha, and Catherine*; and he held the appointment to Stephen to be a valid [270] exercise of the power.(r) Upon this statement of the case, then, it seems to establish this principle, that where a younger child is included by his *name* in a power, he will continue an object of the power, although he lose his character of younger son. But Lord Talbot principally distinguished this case from that of *Chadwick and Doleman*, on the ground that there the question was between the eldest son, become so by his brother's death, and the other younger children; whereas in the case before him, Stephen was the only child left, and the dispute was between him and the administrator of a deceased child, so that this case cannot perhaps be relied on as an authority for the general principle, which at first sight it seems to establish; and certainly if the rule in *Chadwick v. Doleman* is the law of the Court, the question in these cases ought to be, not whether the younger children are in the instrument creating the power called "younger children," or by their proper names, but whether, upon the whole instrument taken together, they are treated as younger children; and whether, judging from the evidence to be collected from the instrument itself, a portion would have been provided for them if they had stood in the place of their eldest brother.

35. These cases profess to go merely upon the intention that the child is not a younger child within the power, and by parity of reason where an eldest child is in effect a younger child, *with reference to the estate*, he may be an object of a power to appoint to younger children; as, where an estate is settled on the son, and there is an eldest daughter, there, although in point of age the daughter is eldest, yet it is well settled that the son, as he takes the estate, though not so by promogeniture, shall be considered an eldest child, and the daughter, though eldest, shall be taken as a younger child;(s) so an elder son unprovided for may

(r) *Jermyn v. Fellows*, For. 93.

(s) *Pierson v. Garnet*, 2 Bro. C. C. 38; and see *Beale v. Beale*, 1 P. Wms. 244; *Lord Teynham v. Webb*, 2 Ves. 210; *Heneage v. Hemlocke*, 2 Atk. 456; *Billingsley v. Wells*, 3 Atk. 221.

take under a provision for younger children; for it is [*271] "to the intention and not to the words *elder* or *younger* that the Court adverts.(t)

36. And younger son or daughter, means younger son or younger daughter: and in a shifting clause, for example, those words may, in favour of the intention, be construed, "a son younger than a son, or a daughter younger than a daughter, from whom the estate is to shift."(u)

37. But of course the change of character must take place before the receipt of the money; clearly a younger son becoming eldest, and taking the estate itself, cannot be called upon to refund a portion received out of the estate whilst he was a younger child, and in that character.(x)

38. It remains to observe, that in the case of *Hall v. Hewer*(y) Lord Hardwicke laid it down, that there was no case where the Court had considered a youngest child as an eldest, but between parent and children, or those who stand *in loco parentis*.(z) but this distinction does not appear to be attended to at the present day.

39. This section may be closed with the observation, that powers to appoint to nephews, or any other class of persons, will be construed by the same rules as are applied to a power to appoint to children. Thus, as under such a power, grandchildren are not the objects, so a power to appoint to nephews cannot be extended to great nephews;(a) yet as a settlement made in favour of the grandchildren, with the assent of the child, is valid, so a like provision may be made in the like case for great nephews.

(t) *Duke v. Doidge*, 2 Ves. 293, cited from Mr. Noel's note; and see *Emery v. England*, 3 Ves. jun. 232.

(u) See *Searisbrick v. Eccleston*, 5 Clar. & Fin. 598.

(x) See *Graham v. Lord Londonderry*, 2 Ves. 199. 531. cited; but see *ibid.* 212; and see *Lodor v. Lodor*, *ibid.* 530; *Coleman v. Seymour*, 1 Ves. 209; *Lady Lincoln v. Pelham*, 10 Ves. jun. 166; *Leake v. Leake*, *ib.* 477.

(y) *Ambl.* 203.

(z) And see *Lord Teynham v. Webb*, 2 Ves. 198; 10 Ves. jun. 174.

(a) *Falkner v. Butler*, *Ambl.* 514.

*SECTION II.

[*272]

OF THE MANNER IN WHICH THE FUND MAY BE SETTLED.

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| 2. Particular interests and contingencies valid. | 8. } | Appointment to separate use of daughter, valid: whether estate real or personal. |
| 3. Where trustees may be interposed. | 12. } | |
| 4. Reversionary interest not sufficient for a portion. | 9. | Appointment to the husband is valid. |
| 5. A power to a child to raise a sum valid. | 14. | Conditions, how far valid. |
| 6. How fund may be appointed to a daughter. | 16. | Conditions invalid. |
| | 17. | Power to appoint to parents or their children discretionary. |

1. WE are now to consider in what manner the fund may be settled on the children, although much upon this subject has been necessarily anticipated in considering what estates may be created under powers in general.(b) and particularly how the property may be appointed where there is but one object.(c)

2. A power to appoint a fund, in such *proportion* as a party shall think fit, implies that he may apportion it out in such manner as he pleases, consequently he may give an interest for life in a particular share to one child, or limit the capital of the same share to another, or even go so far as to limit to a third child upon a contingency, provided he doles out the whole in this various way among all the children only. The power does not require that he should distribute it in *gross* sums, and give each child an absolute interest in that gross sum, for such a power enables the gift of particular interests, and the appointment of such interests :(a) and a general power to apportion lands receives the same construction; therefore, life-estates [*273] or rent charges may in like manner be given to any of the children.(b) Where under such a power it is wished to settle the estate on the eldest son, subject to portions for the younger children, it is usual to limit different parts of the estate

(b) *Supra*, vol. 1, p. 476.

(c) *Supra*, vol. 1, p. 498.

(a) *Alexander v. Alexander*, 2 Ves. 640; *Bristow v. Warde*, 2 Ves. jun. 336.

(b) *Thwaites v. Dye*, 2 Vern *supra* 80. Vide *supra*, vol. 1, p. 512.

to each of the younger children during a term, with remainder as to all to the eldest son in fee, and to give him a power of redeeming the estate by paying the portions intended to be provided for the younger children, nearly in the same way as in a common mortgage for a term of years.

3. In *Trollope v. Linton*,^(c) where the power was to appoint to the use of such one or more of the children for such estate or estates, in such parts, shares and proportions, and in such manner and form as the husband should appoint, and he appointed to *trustees* for 500 years to raise portions for the younger children, Sir John Leach held that creating this term in trustees was a good legal exercise of the power, and that the words "manner and form" enabled him to give equitable estates to his children. The point, however, did not call for a decision, as the power was an equitable one.

4. But under such a power, a merely reversionary interest cannot be given to any one child, as it is intended for a provision.^(d)

5. An appointment may be made to a child for life, with a power to that child by sale or mortgage to raise 1,000*l.* to be payable as he shall appoint, for that is in effect only appointing 1,000*l.* to the child: it is in the nature of property, and cannot be considered as a delegation of the power.^(e)

6. An appointment under the power to a daughter for her separate use, independently of her husband, is so far [*274] from being an objection, that it is more strictly carrying into execution the will of the donor:^(f) and this is still more clearly authorized where the power is to appoint *in such manner* as the donee pleases.^(g)

7. In one case^(h) a father having a power to appoint to his children, gave the interest of a portion to the husband of one of his daughters for life, and after his decease, the capital to the daughter herself. Lord Rosslyn said, that if he had given to the

(c) 1 Sim. & Stu. 477, *supra*, vol. 1, p. 512.

(d) *Alexander v. Alexander*, *ubi sup.* See *Duke of Devonshire v. Lord G. Cavendish*, 4 Term Rep. 744, n.; but see vol. 1, p. 568.

(e) *Brudenell v. Elwes*, 1 East, 442. (f) *Alexander v. Alexander*, 2 Ves. 640.

(g) *Maddison v. Andrew*, 1 Ves. 59; and see *Pitt v. Jackson*, 2 Bro. C. C. 51; *Smith v. Lord Camelford*, 2 Ves. 638. *Cronpe v. Burrow*, 4 Ves. jun. 681; *Wilson v. Grace*, Rolls, MS. Vide *supra*, vol. 1, p. 293.

(h) *Bristow v. Warde*, 2 Ves. jun. 336.

wife for life, and in case the husband should survive, to the husband, that would have been a substantial gift; for it was admitted, a gift for life was sufficient. He had done the same thing: for the husband would in that case, in point of law, have taken during the life of the wife. The insertion of the name of the husband prior to that of the wife, was doing no more than if he had given to the wife first. The intention, therefore, not being to illude, but to give in effect such estate as a married woman could take, viz. for the benefit of the husband as long as the coverture should continue, was not illusory. But the Chancellor principally relied upon the circumstance of the daughter having been provided for by the father in his lifetime.

Now it must be observed, that on the preceding case Lord Rosslyn did not mean to say that the excess beyond the wife's life would not be considered void in case her husband survived her. (i) And we should be cautious how we admit the doctrine that the fund may be appointed to the husband even ['275] during the joint lives of him and his wife, for *he* is no object of the power, and although, as it was observed by the Court, the husband will take during the life of the wife, where it is given to her, yet he will take in a different right, and subject to equities, to which he would not otherwise be liable. If he take under a direct appointment to himself, he may be considered as the absolute owner of it; whereas, if he merely take in his marital right, his wife would, in certain cases, have her equity for a settlement out of it, which would bind his assignees, if he should become bankrupt, his creditors claiming under an assignment from him, and persons claiming under him without any valuable consideration; although not purchasers for a valuable consideration: (j) and where the power rides over real estate, and operates under the Statute of Uses, it seems clear that an appointment to the husband would not invest him with the legal estate, he not being an object designated in the power. But it is probable, that under such an appointment, where the husband can take, he would be held to take in exactly the same manner as he would have done had the fund been appointed to his wife.

(i) See *Burleigh v. Pearson*, 1 Ves. 281.

(j) See *Elliott v. Cordell*, *Aguilar, v. Aguilar*, 5 Madd. 149. 414; *Stanton v. Hall*, 2 Russ. & Myl. 175.

8. Thus far as to the quantity of interest which may be given to each child, and we may now consider what conditions may be imposed by the person executing the power.

9. In *Parsons v. Parsons*,^(k) the fund was settled for the portions of the younger children, at such times and in such proportions, and subject to such provisions and conditions, and in such manner and form, as the parents should appoint, and in default of appointment to them equally. Lord Hardwicke observed, that the [*276] appointment "might be made subject to such provisions and conditions as they should think fit, which though equity would construe to be such as were reasonable, yet if upon marriage of one of their daughters, they had appointed a particular sum, with conditions, that if such daughter left no issue it should go to the other children, it must have waited until it was known whether she did or did not leave issue. But this is hardly a good example of a condition, for this was a limitation over in a contingent event, which would have been authorized under the above case, if the words such provisions and conditions had been inserted in it.

10. In *Pawlet v. Pawlet*,^(l) Lord Hardwicke laid it down, that where a father has only a power of appointment, or distributing portions which are to be raised at all events, he cannot annex any condition to the payment of any share which he appoints.

11. A parent having a power to appoint a fund amongst his children, cannot, unless he has a power to annex such a condition, restrain a child's share to the payment of a particular debt, for there may be a defence to that debt. Therefore where a father appointed a share to his daughter, to pay a debt of her husband, for which the testator's son was surety, Lord Hardwicke set it aside. He considered it bad, because not given for her benefit, although by possibility the discharging her husband's debts might tend thereto. It might be otherwise.^(m) And of course he cannot annex any condition for his own benefit;⁽ⁿ⁾ nor can the property appointed be exempted by the donee of the power

(k) 9 Mod. 464.

(l) 1 Wils. 422. Vide *supra*, vol. 1, p. 578; *infra*, p. 301.

(m) *Burleigh v. Pearson*, 1 Ves. 281; and see *Alexander v. Alexander*, 2 Ves. 640.

(n) *Roberts v. Dixall*, 2 Eq. Ca. Abr. 668, pl. 19; App. No. 17. See *Bailey v. Lloyd*, Russ. 330. 342; the father's covenant, which was satisfied by the appointment, appears to have extended to the sums in settlement.

from the debts *of the appointee, but it must be left to [*277] take the fate of being his property, and subject to be come at as his creditors shall think fit; (o) and in these cases the appointment is valid, and the condition altogether inoperative. (p)

12. Of course where a power is given to appoint a fund amongst certain persons *or* their children, a discretion is given. The donee may direct to whom the fund should be given, the parents *or* the children. (q)

13. In a late case, (r) when a testator gave a fund to his wife for life, and after her death directed it to be divided amongst his cousins, whom he named by classes, in such proportions, &c., as his wife should appoint, and in default of appointment, he gave the same unto his said cousins equally: and it was his will "that the child or children of such of my cousins as are now or the time of my decease may be dead, or of such of them who shall die during the life of my said wife, shall stand in the place of their deceased parent or parents, and be entitled to such interest and benefit as the parent or parents of such child or children would have been entitled to by this my will, in case he or she had survived my wife:" the Court was of opinion that the children of a cousin who was alive at the testator's death, and afterwards died in the widow's lifetime, were entitled to stand in his place, and have such appointment of shares as a court of equity might limit. So that the direction that the children should stand in the place of their parents, was held to make them objects *of the power itself, or in the place of their parents. [*278] when the latter by death ceased to be such objects.

14. We have already had occasion to consider in what cases appointments may be made to the *surviving* children, and the effect of an advancement by the parent, and also the general construction of a gift to children in default of appointment; and what cases, under particular limitations, their issue may stand in their place, or take in competition with them. (s) We have also

(o) *Alexander v. Alexander*, 2 Ves. 640.

(p) And see *Bushy v. Salter*, *supra*, 279; *Spencer v. Duke of Marlborough*, *supra*, vol. 1, p. 180; *Daubeny v. Cockburn*, 1 Mar. 645.

(q) *Longmore v. Broom*, 7 Ves. jun. 124.

(r) *Fox v. Gregg*, App. No. 24.

(s) Ch. 11.

seen in what eases a power to appoint to children is a trust, which the parent or other donee is bound to execute. (t)

SECTION III.

OF A POWER TO RAISE PORTIONS.

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| 1. Resemble powers to appoint a fund. | 14. Interest is applicable for maintenance. |
| 2. Whether conditions can be imposed. | 15. Past interest does not sink with portion. |
| 3. Where all younger children are included. | 16. Rate of interest. |
| 4. Limitations over, &c., valid. | 17. Where interest payable by a jointress. |
| 5. Portions cannot be made to vest before they are wanted. | 18. Portions postponed by a jointure created under a power. |
| 6. Excess in time of vesting, corrected. | 20. Construction of power in articles. |
| 8. } Child dying before portion required, | 21. Implication of survivorship in articles. |
| 10. } it sinks. | 22. Power to appoint portions not authorized by articles under general words. |
| 11. Interest may be charged. | |
| 12. When raised under reversionary terms. | |

1. THE usual powers to a parent to appoint portions to be raised for the children, where no fund will be in existence ['279] *unless appointed, are not distinguishable in their main features from powers to appoint to children an estate or a fund actually set apart. (a)

2. But in *Pawlet v. Pawlet*. (b) before referred to, Lord Hardwicke took this distinction, that where a father has only a power of appointment, or distributing portions which are to be raised at all events, he cannot annex any condition to the payment of any share which he appoints; otherwise it is where the portions are not to be raised at all without the father's appointment, for there the father may annex a condition. This, however, was a *gratis dictum*, and I have not met with any case in which the distinction has been acted upon. It would be difficult to establish such a general rule upon principle, as in each case the words of the power must be the guide of the father's appointment.

(t) Ch. 9, s. 8.

(a) *Menzey v. Walker*, For. 72.

(b) 1 Wils. 234. Vide *supra*, p. 298.

3. A general power in a will by which estates are devised in strict settlement, for a tenant for life to charge portions for his younger child or children, includes all the younger children by any marriage.(c)

4. If a sum of money is to be settled upon younger children, the donee of the power may introduce limitations over, clauses of survivorship, &c.(d)

5. Although a power is given generally, yet the Courts, or at least equity, will not permit it to be exercised so as to give a vested interest before the time in which it was the intention of the parties that the portion should vest. Thus, where portions for younger children were to be raised at such times as the father should direct, and he having a daughter fourteen years of age, directed the trustees to raise the portion immediately;

*the daughter died under age, and the father claimed [*280] her portion as administrator; Lord Thurlow said, "The meaning of a charge for children is, that it shall take place when it shall be wanted. It is contrary to the nature of such a charge to have it raised before that time. And although the power is in this case to raise it when the parent shall think proper, yet that is only to enable him to raise it in his own lifetime, if it should be necessary. It would have been very proper to do so upon the daughter's marriage, or for several other purposes, but this is against the nature of the power." And the bill was dismissed.(e)

6. In *Edgeworth v. Edgeworth*,(f) when the power was to charge estates "with reasonable portions or fortunes for younger children, and for their maintenance and education," a portion was appointed to a child under twenty-one, payable on the death of the appointor, with interest; and it was held not to be vested so as to be transmissible, as the infant died under twenty-one. Lord Chancellor Hart said, that to prevent the intention from being defeated, the word reasonable must be considered as pervading

(c) *Burrell v. Crutchley*, 15 Ves. jun. 544.

(d) See 15 Ves. 552; *Brograve v. Winder*, 2 Ves. jun. 634.

(e) *Lord Hinchinbroke v. Seymour*, 1 Bro. C. C. 395; and see 11 Ves. jun. 479, S. C., cited by Lord Eldon, who said, the daughter was consumptive. See 1 Beat. 334; *Cunynghame v. Thurlow*, 1 Russ. & Myl. 436, n.

(f) 1 Beat. 328.

every part of the powers: and therefore the appointment, to be reasonable, should be so not only in amount, but in the time and occasion on which the child would want the portion.

7. We have already seen, that if the power be only to give unconditionally, and it be exceeded by directing the portions to be paid at twenty-one or marriage, the appointment will be reformed, and the portions be made payable at once. (g)

[*281] *8. In *Warr v. Warr*, (h) the father under a marriage settlement had power to raise a term of ninety-nine years in lands for raising given portions for the younger children, to be paid at such times as the trustees in their discretion should appoint, for their better maintenance and preferment; the father limited the sum accordingly and died: the youngest son died at seventeen, and it was held that his portion sunk into the inheritance.

9. In *Brown v. Nisbett*, (i) the trust of a term, to commence in possession after the demise of husband and wife, was to raise such sums, not exceeding 200*l.*, for the settlor's two daughters as the husband and wife should appoint, and in failure of such appointment, as the survivor should appoint, with interest from such time as the term should commence in possession, and not before. By a joint appointment, the 200*l.*, was directed to be equally divided between the daughters, to be paid to them six months after the death of the survivor of the father and mother, and if either of them died before payment or the money became due, then the money being the share of her dying to be for the benefit of her executors. One of the daughters did so die. Lord Thurlow held the appointment over to the executor void. He said it had been insisted, that if a daughter die before time of payment, the portion shall not be raised, but sink into the inheritance, like the common case of portions reserved on marriage, payable out of the inheritance at a subsequent time, and the daughter dies before that time; and he saw no difference. The execution was part of the power: suppose then it had been inserted in the original deed, it would have been so.

(g) *Dillon v. Dillon*, 1 Ball. & Beat. 77; but qu. whether the power was exceeded.

(h) *Prece. Cha.* 213. See *Shelden v. Dormer*, 2 Vern. 310; *Mayhew v. Middleditch*, 1 Bro. C. C. 162.

(i) 1 Cox, 13.

*10. And it is settled now, that whether the portion charged upon land be given with or without interest by [*282] deed or will, if the person dies before the age at which it becomes payable, it shall sink into the estate.(*k*)

11. We have seen that the general rule is, that a power to charge a principal sum with an immediate security, includes a right to charge the interest besides.(*l*)

12. And although portions are secured upon a reversionary term, to commence after the life estates in the husband and wife, and in default of appointment, are not payable until after the death of the survivor of the husband and wife, yet the father, under a power to appoint the portions at such time, or times, &c., as he shall think fit, may, although his wife survive him, make an immediate appointment to the children, so as to burden the estate with interest on the portions from his death ;(*m*) but of course it could not be raised against the life estate.

13. In *Boycot v. Cotton*,(*n*) in a strict settlement, the tenant for life had a power to charge any part of the lands, not exceeding 500*l.* a year, for portions for his younger children, and also a power of jointuring. He exercised both powers, and charged the part of the estate not charged with the jointure, and after the decease of the jointress charged the other part also, with fixed portions, (the whole of the lands charged not amounting to above 500*l.* a year,) to be paid to sons at twenty-one, and to daughters at twenty-one or marriage, and to be paid with interest at five per cent. per annum from his death *to the pay- [*283] ment thereof, and Lord Hardwicke (who relied partly upon the fact that the whole value of the estate was charged with the portions,) held that the donee could charge the estate, although partly in reversion, with interest ; for where there is a power to charge an estate with a gross sum, it likewise implies a power to charge it with interest, because it may be necessary that interest should be given by way of maintenance.

14. And where interest is thus charged, it ought not to accumu-

(*k*) Per Lord Hardwicke, 1 Atk. 555.

(*l*) Lord Kilmurry v. Geery, 2 Salk. 538. See 2 P. Wms. 671; *Orby v. Lord Mohun*, Gilb. Rep. 45; *Roe v. Pogson*, 2 Madd. 457.

(*m*) *Conway v. Conway*, 3 Bro. C. C. 267; *Wynter v. Bold*, 1 Sim. & Stu. 507.

(*n*) 1 Atk. 552; and see *Hall v. Carter*, 2 Atk. 354. 358.

late, but to be paid annually, for the natural construction is, that it should be paid annually, and becomes due every day; and it is given as a recompense in the mean time, till the principal is due. And it will be considered as maintenance; for giving interest is the same thing as giving express maintenance.(o)

15. So although the principal will sink into the inheritance, where the child dies before the portion is required, yet the interest as maintenance will be payable to the person by whom it has been maintained.(p)

16. The donee of the power, having power to charge interest, may fix the rate, not exceeding the legal rate.(q) If no rate is fixed, the Court will give four per cent.(r)

17. In *Beale v. Beale*.(s) the portions appointed under a power were held to override the wife's life estate limited by the settlement. The portions were made payable by the instrument executing the power, at twenty-one or marriage, without [*284] more. Lord Harecourt gave them interest on their portions at three per cent. till twelve, from thence four per cent.; but upon an appeal by them, Lord Cowper held, that they could not charge the jointress with interest until the portions were payable, but from that time they were to carry the full legal rate; but he said, that the reason of postponing the payment being in favour of the jointress, she ought to maintain them out of the profits of her jointure lands. But this appears to have been rather an intimation to her what she ought to do, than an order upon her to do it.

18. And unless a contrary intention appear, the introduction of a jointure by the exercise of a power, will postpone the payment of the portions until the death of the jointress; and if the principal is not raisable in the lifetime of the jointress, the interest cannot be due until after her death, for interest is only in lieu of non-payment of principal.(t)

19. And in these cases the design of the whole settlement must

(o) Per Lord Hardwicke, in *S. C.*, 1 *Atk.* 555.

(p) *S. C.*, *Warr v. Warr*, *Prec. Cha.* 213.

(q) *Lewis v. Freke*, 2 *Ves. jun.* 507; *Sitwell v. Barnard*, 6 *Ves. jun.* 520. 544.

(r) *S. C.*, see *Codrington v. Foley*, 6 *Ves. jun.* 364.

(s) 1 *P. Wms.* 244; *Gilb. Rep.* 93; vide *supra*, p. 43.

(t) *Churchman v. Harvey*, *Ambl.* 341.

be taken into consideration, and fruit should not be extorted from a barren reversion, except where the owners have expressly directed it.(u)

20. Where articles for a strict settlement, directed that the settlement should contain a clause "empowering the husband to charge 1,000*l.* for the younger children of the marriage," the Court inclined to think it meant a charge on the estate as a provision for the younger children, with a power only to the father to apportion the shares.(x)

21. If in default of appointment, portions are by articles agreed to be settled upon the children at the usual ages, as "tenants in common survivorship between the children ["285] may be implied in favour of the intention.(y)(1)

22. In *Higginson v. Barneby*.(z) a testator by his will directed a strict settlement to be made of his real estate on his nephews and their sons, and that there should be a power for the nephews to jointure to a certain extent, and a power to the trustees to sell and exchange, and also a power to the beneficial devisees and trustees to lease; "and that there should also be contained in such settlement all other clauses, powers, and provisoes as are usually inserted in settlements or deeds of that kind;" it was held, that the will did not authorize a power to appoint portions to younger children, because the effect of such a power would be to diminish the estate, which was expressly limited in strict settlement, and because there was no certain rule as to the quantum of such portions, by which the Court could be guided. The words were considered as referring to usual and necessary powers of management.

(u) *Reynolds v. Meyrick*, 1 Eden, 48; *Evelyn v. Evelyn*, 2 P. Wms. 659.

(x) *Savage v. Carroll*, 1 Ball. & Beat. 265.

(y) *Hynes v. Redington*, 1 Rep. t. Plunkett, 33.

(z) 2 Sim. & Stu. 516.

(1) *Qu.* whether the clause to be supplied was not the common clause, that no one child, in default of appointment, should take more than 10,000*l.*

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*CHAPTER XVI.

OF POWERS TO JOINTURE.

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|--|---|
| 2. May be exercised in favour of successive wives. | 22. Taxes confined to time when power was executed. |
| 3. Unless confined by intention. | 23. Value to be taken at the same period. |
| 4. Repeated executions for the same wife good. | 25. } Covenant confined to power, where |
| 5. Not exhausted by a declaration that remainder-man shall take the surplus. | 26. } there is mistake. |
| 7. } Power cannot be exceeded as to | 27. Where the power extends to the whole |
| 12. } quantity or value of land to be | 28. Where the jointure will not bar dower. |
| 12. } charged. | 29. If required, equitable bar sufficient. |
| 8. Must be to the wife herself. | 31. Whether if to be in bar of dower, it |
| 9. Chattel interest cannot be substituted for freehold. | 32. Alterations by statute in the law of |
| 10. Insufficiency of lands made good. | 32. dower. |
| 11. To what extent wife is relieved. | 33. Appointment upon condition, ap- |
| 12. Husband not entitled to her fortune if jointure invalid. | 33. pointor may release condition. |
| 14. May be agreed to be exercised by remainder-man. | 34. Jointure in proportion to fortune, how |
| 15. } What agreements bind the power. | 34. the latter should be paid. |
| 16. } Where the jointure may be clear of | 35. } Or settled. |
| 17. } taxes. | 36. } Fortune received after husband's |
| 21. Where articles shall be construed by the power. | 37. death not taken into account. |
| | 38. Fraudulent execution. |
| | 39. Death-bed execution. |

1. It has been already shown in what instances equity will aid the defective execution of a power to jointure, (a) and the estates which may be created under the power have also been pointed out. (b) It remains only to recall our recollection to [*289] these points, and to state such questions as *may be said peculiarly to relate to this power, although certainly the decisions upon them equally govern any other power of a similar nature.

2. As the object of a power to jointure is to enable the party to whom it is given to make a provision for the wife who shall

(a) Vide supra, ch. 10.

(b) Vide supra, ch. 7.

survive him, and as the power, however frequently exercised, can only operate as a charge in one instance, the most liberal construction should be put upon the power in favour of a repeated execution of it. And under a power, if a man's present wife die, and he marry any other wife, *then and so often* to settle a jointure for *such* wife during *her* life, he may settle a jointure upon any wife that he may afterwards marry, and so *toties quoties*.(c)

3. But in a case where the testator directed, that if his son married a gentlewoman with a good fortune, the trustees should settle a rent-charge on her for life, subject thereto, on the issue of that marriage in strict settlement; but if the son died without issue, then over; and the question was, how the estate was to be settled; Lord Hardwicke determined, that an estate-tail should be given to the son after the strict settlement, as otherwise the issue of any future marriage could not take, which would defeat the testator's intention. He said it was objected that this inconvenience would not happen there; for that the trustees might execute this power *toties quoties*, and that *gentlewoman* was *nomen collectivum*. But that, he said, would not be according to the construction of powers, which can be executed but once, unless the words import otherwise, as it evidently was not there, although it might be executed upon a second wife, if not done before. And this decree, he added, answers all the words in the will.(d) This case, it will be observed, can scarcely be ranked with those upon the common power of jointuring, for the object of the power "was to make a strict settlement of [*290] the estate, and not merely to authorize the limitation of a jointure.

4. And as we have already seen, such a power may be executed in favour of the same wife at different times, provided that the party do not in all the executions exceed the limits of the power.(e)

5. And although a jointure less than the power authorizes may appear by the deed to be a full execution of the power, or to

(c) *Hervey v. Hervey*, 1 Atk. 561; *Barnard*, Cha. Rep. 103; and see 2 Burr. 1144, 1145.

(d) *Allanson v. Clitherow*, 1 Ves. 24.

(e) *Hervey v. Hervey*, 1 Atk. 561, et ubi sup.; *Zeuch v. Woolston*, 2 Burr. 1136; 1 Blackst. 281; and see *Doe v. Milborne*, 2 Term Rep. 721.

amount to a release of it, yet, as we have also seen, the intention must appear clearly ; therefore a declaration in a deed partially executing a power of jointuring, that it is in lieu of dower and thirds, and that the remainder-man shall have the surplus, will not operate as a release of the power, for they are only words put in by conveyancers as of course. (*f*) The practice in conveyancing is said to be, to release the power and all further claim to it whenever the power is completely executed, and there is no intention to go any further in the exercise of it. (*g*)

6. In *Zouch v. Woolston* (*h*) the words were very large : “ from time to time during his life, by deed or deeds, writing or writings, to limit all or any part of the estate to any woman or women that shall be his wife or wives, for and during their life or lives ; ” and yet it was argued that this manner of expression was meant to take in the case of marrying *different* wives one after another ; but the Court said it had no meaning other than by applying these words to *each* respective wife that he might marry, and construing them to empower the husband to make different settlements upon the *same* wife.

7. In discussing the general subject, we have elsewhere considered what interests may be appointed and where [‘291] there may be a limitation to trustees for the object of the power. (*i*) As before stated, a power to grant a jointure rent-charge on any part of the estate of a particular value, will not, even in equity, authorize an appointment of a jointure rent-charge on the entire estate ; nor will a power to settle part of the land of a given value, authorize an appointment of a rent-charge of the same value on the whole estate ; but equity in favour of the wife would relieve against the defective appointment.

8. In *Hervey v. Hervey*. (*k*) the power was to make a jointure of such of the lands as he thought proper, not exceeding 600*l.* a year. In the execution of the power, the devisee conveyed all the lands which were subject to the power to trustees, not to the wife,

(*f*) Vide *supra*, vol. 1, p. 89 ; *Hervey v. Hervey*, *ubi sup.*

(*g*) See 2 Burr. 1149, per Wilmot, J.

(*h*) 2 Burr. 1136.

(*i*) *Supra*, vol. 1, p. 486. 489.

(*k*) 1 Atk. 561.

for raising the jointure. Lord Hardwicke said that the words jointure or provision were synonymous terms, but this was a conveyance to trustees, which is, in point of law, no jointure, for to make it so, the provision ought to be to the *wife* herself. No conveyance could be pursuant to the power but what was to the wife herself, and the point was ruled the same way in the case of *Churchman v. Harvey*.^(l)

9. We have before seen, that under a power to jointure by limiting the estate to the wife for her life, a term of years dependent on her life cannot be created at law, because the estates are different, one being a freehold and the other a chattel, and the freehold in her being a qualification to any future husband to be a member of Parliament, kill game, &c. (under the old law); but such an appointment would be supported in equity.^(m)

10. So we have seen, that where the power is actually executed, but lands to the value agreed upon are not settled, the wife will be relieved against the remainder-man.⁽ⁿ⁾

*11. Where in pursuance of articles a husband [*292] settled a jointure upon his wife, and afterwards voluntarily appointed to her under a power a jointure of 250*l.* a year as an additional jointure, but which was declared to be in recompense of all deficiencies either in title or value of any estate on her before settled or agreed to be settled in consideration of their marriage; and the first proved defective both in title and value, for he was only tenant in tail of the estate, and died without issue and without suffering a recovery; the settlement was made good against the remainder-man to the extent of her articles and of her right of dower,^(I) and the 250*l.* per annum was held

(l) See *Ambl.* 341.

(m) *Supra.* vol. 1, p. 491.

(n) *Supra.* ch. 10, s. 2.

(I) The case is complicated. Viner states it inaccurately. The articles were general, but to be of lands in a county in which some of the lands were situated, of which the husband was tenant in tail, without any power; and the settlement itself was of lands in the three counties of which he was so tenant in tail. The power was not attempted to be executed until the appointment of 1705; and this in the decree, as stated in 4 Bro. P. C. is probably by mistake called her *original* jointure: it was her only jointure. The original settlement was of course void against the remainder-man, and so were the articles; but as she was let in to the extent of the articles on any estate of which the husband was seised in fee or *fee-tail*, it must, it should seem, have been on the ground, that her dower in equity was not extinguished, although she had

not to be a part satisfaction, for when he settled that he thought that he had made a prior good settlement of the 500*l.* per annum on her, so that he intended her to have both.(*o*) The declaration therefore in the appointment was not held to restrain her right to what she had contracted for, and which her husband's estate enabled the law to make good.

12. And we may again observe, that if the husband is to become entitled to the wife's fortune in consideration of the jointure, and she cannot obtain the jointure, she may retain her own property.(*p*)

[*293] 13. If a power authorize a portion of the estate of a given value to be settled, and the husband appoint the whole estate, being of greater value, to trustees for the benefit of his wife, by way of jointure, without mentioning any rent-charge at all, and then adds this clause, according to the power to him reserved, the Court in such a case would hold the power to have been well executed for a part of the estate of the annual value allowed to be charged.(*q*)

14. As we have already seen, powers of jointuring, to be exercised when in possession, are frequently agreed to be executed by *remainder-men* whose right of possession has not accrued, and equity will make good the appointment if the party afterwards do actually come into possession.(*r*) Whether powers may be accelerated by accepting a surrender of a previous life-estate, so as to acquire the possession, has already been considered.(*s*)

15. And where the party has a power to jointure, an agreement to secure a given jointure, according to his power or otherwise, will be deemed a primary charge on the estates within the power.(*t*)

16. This was carried very far in *Jackson v. Jackson*,(*u*) where

joined in levying a fine. The prayer of the bill was to have her jointure confirmed, or her dower assigned, by way of recompense, but of all lands whereof her husband was seised in fee or in tail, according to the proviso in the 27 H. 8, c. 10.

(*o*) *Lady Hooke v. Grove*, 5 Vin. Abr. 293, pl. 40; 4 Bro. P. C. by Toml. 593.

(*p*) *Supra*, ch. 10, s. 2.

(*q*) *Barnard. C. C.* 116, per Lord Hardwicke.

(*r*) *Jackson v. Jackson*, 4 Bro. C. C. 462; *supra*, ch. 10, s. 2.

(*s*) *Supra*, vol. 1, p. 339.

(*t*) *Coventry v. Coventry*, 2 P. Wms. 222; *supra*, ch. 10, s. 2, see the cases stated.

(*u*) *Ubi sup.*

under a resettlement a son, tenant for life in remainder, after his father's life interest, of an estate in the county of York, with a power of jointuring when in actual possession, executed a few months after the first deed a marriage settlement, in which his father joined, and the father and son covenanted within twelve months to assure to the intended wife a sufficient estate for her life, to take effect in possession after her husband's death, in freehold lands in the county of York of the yearly value of 100*l.*, or otherwise that the son would, within that time, assure *unto her an annuity of 100*l.*, to be issuing out of free- [*294] hold lands of a competent value in the county. The son lived to come into possession and died without having executed the power, leaving a small real estate and a very small personal estate, not sufficient to pay his debts. Lord Alvanley held that the settled lands were bound by the covenant. He said no lands were pointed out: it is a mere covenant; and it is said though he entered into the covenant he had something further in view. The father joins in the covenant that the son shall make the settlement. It was argued that there was nothing to show it was to be out of this estate: he thought there was a great deal, *for he had no other estate out of which he could do it.*—The son living to be in possession would have been decreed to settle: *so that whether he had the power in contemplation at the time of entering into the articles or not, having a power to settle, and no other estate, any person entitled might have called upon him to settle.*—He did not think the cases which say that the Court will not supply the non-execution of powers were affected by this: there it is a duty of imperfect obligation: here he was bound to do it in the way that he could; and the Court would construe it to be intended for parties claiming *bonà fide*, and for valuable consideration.

17. A general power to jointure to a particular amount, without expressing that it shall be clear of taxes, will only enable an appointment of the jointure, subject to natural outgoings, as parochial payments and repairs, &c.(*x*)

18. Where the jointure is to be of the *clear*(*y*) yearly value, it means clear of incumbrances and all other charges, which by the

(*x*) *Hervey v. Hervey*, 1 Atk. 561; *Barnard. Chancery Rep.* 103; *Lady Londonderry v. Wayne*, Amb. 424; see *Trevor v. Trevor*, 13 Sim. 136. 152.

(*y*) See *Da Costa v. Villareal*, 1 Bro. C. C. 4, n.; *Hodgworth v. Crawley*, 2 Atk. 376.

course and usage of the country in which the lands lie, ought to be borne by the tenant, but subject to the land-tax and [*295] all other outgoings, which, according to *such course of the country, ought to be borne by the landlord. In the case in which this was decided, Lord Hardwicke said, that the word "clear" should be construed in the power as it would in an agreement between buyer and seller, that is, clear of all outgoings, incumbrances, and extraordinary charges, not according to the custom of the country, as tithes, poor-rates, church-rates, &c. which are natural charges on the tenant. If, he added, in the country where these estates lie, it has been the custom for the landlord to pay those rates, he should have thought this jointure ought to have been subject to them, for they would in such case be only ordinary charges. But the contrary was proved, that it was not the custom of the country.(z) And where the *custom* is for the tenant to pay, it is not material that in respect of the particular estate the landlord has agreed to pay them, so as to increase the nominal value of the lands by increasing the rent.(a)

19. So under the words *clear of charge* or *reprise* the jointure could not be limited clear of land-tax.(b)

20. But where the power was to jointure to a stated amount, *impositions, imposed, or to be imposed, parliamentary or otherwise*, without any deduction or abatement, *for any taxes, charges, or* but subject to leases in being at the time of such execution made, Lord Hardwicke decreed that the power authorized a jointure to be appointed, "free from all incumbrances, rent-charges, rents-seck, fee-farms, quit-rents, annuities, stipends to ministers, pensions and procurations payable thereout, and also free from all parliamentary taxes or impositions of such nature and kind as were in being at the time of executing the power, and particularly from the land-tax then in being;"(c) and the words *free* [*296] *from taxes*, particularly embrace the land-tax, as being the only tax to which land is absolutely liable.(d)

(z) *Earl of Tyreconel v. Duke of Ancaster*, Ambl. 237; 2 Ves. 500.

(a) S. C.

(b) Ambl. 240; 2 Ves. 510; as to the extent of the word *reprise*, see *Hall v. Hall*, 2 Dick. 710; and see 2 Atk. 545.

(c) *Marchioness of Blandford v. Duchess of Marlborough*, 2 Atk. 542.

(d) *Champernon v. Champernon*, Dougl. 626, cited; and see on the general question, *Brewster v. Kitchen*, 1 Lord Raym. 317; *Bradbury v. Wright*, Dougl. 624; and see *Da Costa v. Villareal*, 1 Bro. C. C. 4, n.

21. And where a man having power to jointure clear of all *taxes*, by articles referring to his power, agrees to grant a jointure free from *reprises*, or the like, although the words may not be co-extensive with those in the power, yet as the intention is evident, it shall be considered an agreement to grant such a jointure as is authorized by the power.(e)

22. But Lord Hardwicke very properly determined, that where *land of a given value* is to be settled, the taxes from which the jointure is to be free, are such only as were in being *at the time of executing the power*, not and the same as to the *quantum* of any existing tax, so that the land would be free in the hands of the jointress from any future increase of the tax,(f) for otherwise this mischief would follow, that whenever any tax varied, that would be a defect in the value of the jointure, and the jointress would come into a court of equity to make the defect good against the remainder-man.

23. And where lands of a given value are to be settled, the value is in other respects to be taken as it stood *at the time of the execution of the power*. This Lord Hardwicke repeatedly determined.(g) If by any accident after the execution of the power there should be an excess, it will be for the benefit of the jointress. By parity of reason, if there should be any deficiency by inundation, or casualties, the jointress [*297] must acquiesce under it; to construe it otherwise would make these powers desultory.(h) But in a subsequent case before Lord Northington, where the point was not much debated, he held that the value cannot be fixed with justice *but at the time of the husband's death*. The wife cannot know the value but by inspection of leases, or by information, if the estates are in hand. The rent taken at a particular time, and under a particular letting, ought not to bind the wife. The rent of an

(e) *Marchioness of Blandford v. Duchess of Marlborough*, 2 Atk. 542; *Lady Londonderry v. Wayne*, Ambl. 424, *et infra*.

(f) *Marchioness of Blandford v. Duchess of Marlborough*, 2 Atk. 542; and see Ambl. 239; 2 Ves. 502; 13 Sim. 136.

(g) *Marchioness of Blandford v. Duchess of Marlborough*, 2 Atk. 542; *Earl of Tyreconnel v. Duke of Ancaster*, 2 Ves. 500; Ambl. 237; and see *Vernon v. Vernon*, Ambl. 1.

(h) See 2 Atk. 544; and see *Speake v. Speake*, 1 Vern. 217; *Pinnell v. Hallet*, Ambl. 106.

estate is very uncertain ; it often varies ; the landlord is often obliged to give boons. Where he has been at an expense of improving, it is common for the tenant, instead of paying a sum of money for the improvements, to pay an increase of rent ; and he accordingly decreed the value of the lands to be taken as at the time of the husband's death.(i)

24. The case before Lord Northington is, in some respects, distinguishable from those before Lord Hardwicke, but their opinions are at variance; for according to the report, Lord Northington laid down the rule generally.(l) The value must be taken as it stood at some given time, and Lord Hardwicke's is decidedly the better rule. For by that rule, if the power be duly executed, with reference to the time of its execution, no question can arise upon any subsequent rise or fall in the value of the lands : whereas, if Lord Northington's opinion were to be followed, nearly every case of this nature would occasion a suit in equity ; because in most cases the lands would rise or fall in value between the time of the execution of the power and the husband's death.

25. Where a man covenants that a jointure is of a [*298] given value, the wife has of course a remedy to have the defect supplied out of her husband's assets ;(k) but where it is clear that the parties merely intended that he should execute his power, although he agrees to do something beyond it, the Court will consider the excess as a mistake, and will not give the wife a compensation in respect of it out of her husband's assets. This was settled in the case of Londonderry v. Wayne.(l) where a man having a power to jointure to the extent of 400*l.* generally, agreed to convey part of the estates comprised in the power, of the yearly value of 400*l.*, *clear of taxes and reprises*, to his wife, and afterwards executed his power *without* making the jointure clear of taxes. And Lord Northington decreed, that the insertion of the words "clear of taxes

(i) *Lady Londonderry v. Wayne*, Ambl. 424. See and consider the case.

(k) *Probert v. Morgan*, 1 Atk. 440.

(l) Ambl. 424 ; and see the converse of the case, *supra*, p. 297.

(I) In 2 Eden, 173, the words are, "I think where there is a settlement of this nature," so that Lord N. perhaps meant to confine the rule to the peculiar case before him.

and reprises," was a mistake. The persons concerned imagined that the words of the power were to be so understood; and he was of opinion that it was not the husband's intention to covenant beyond his power of jointuring. Another ground relied upon was that the settlement rectified the mistake: and that the wife, who had reserved a great part of her own fortune to her separate use, and was assisted by her own solicitor, a man of eminence, was to be considered a feme sole, and capable of contracting, although she was under coverture.

26. But of course this rule can only prevail where it is evident that a *mistake* was made *by all parties*, therefore if the power was not known to the wife, and not referred to in the articles, it is clear that the wife might come against her husband's assets for any deficiency, although he should execute his power to the fullest extent; and it would be no plea that he himself mistook the construction or extent of his power.

27. Where an estate was devised to the testator's son for life, and that he should be capable, with the consent of the *trustees, to settle a jointure on the woman they agree [*299] to, in writing, he should marry, it was considered that, although the trustees might regulate the quantum, yet the power extended over the whole of the estate.(*m*)

28. Where the power simply is to appoint a provision for, or in the name or in lieu of jointure, (which does not bar dower,) the provision will be no bar of dower, unless declared to be so by the donee of the power.(*n*) It appears to have been considered that the donee may properly insert such a provision,(*o*) and that opinion may, it is apprehended, from the nature of the power, be supported on solid grounds. This question is now of little importance.

29. In *Newport v. Savage*,(*p*) (better known by the name of *Rattle and Popham*,) the power was to appoint the estate to the wife for her life, in lieu of jointure, and the appointment (which was bad at law as being a chattel interest in trustees) was made in

(*m*) *Mansell v. Mansell*, *Wilmot's notes*, 36. As to the consent of the trustees see vol. 1, p. 326.

(*n*) See 2 *Burr.* 1144.

(*o*) See 1 *Atk.* 567.

(*p*) *App.* No. 17.

bar of dower. Lord Talbot said, that it was objected that this was such an estate that this was no bar of dower, but the donee, he said, was left at large to make a provision for his wife. Besides, in the settlement made on her, it was generally said to be in bar of dower, and therefore, as it would be an equitable execution of the power, so it would be an equitable bar of dower.

30. It seems clear that Lord Talbot's opinion was, that the jointure need not have been made in bar of dower; and it establishes the rule, that if it be necessary, an equitable bar of dower will be sufficient.

31. In *Aleyn v. Belchier*(*q*) the power was to a tenant for life under a will to make a jointure on any woman he should then after marry, for her life, in bar of dower. After marriage a jointure was made in fraud of the power and it was not de-
[*300] clared to be in bar of dower, but simply for her jointure.

The Lord Keeper said, that he was inclined to think the power was not well executed in point of law. It ought to have been before marriage. The power was given under restrictions. It must be a jointure in bar of dower, which can only be before marriage; dower is not barable by a jointure after marriage. But he built his opinion in the case upon another point.

32. There appears to be no foundation for this doubt. The power does not require that the jointure shall operate as an absolute bar of dower, but that it shall be made in bar of dower. If it is made in bar of dower, the power is complied with, and it must, if accepted, be taken as a bar of dower. If it should be rejected because made after marriage, the execution would altogether fail. There seems reason to contend, that if under *such* a power nothing is said about dower, but the appointment is simply of the estate as *a jointure*, it would, with reference to the terms of the power, be a bar of dower, and the power therefore would be well executed.

33. But the importance of a jointure being in bar of dower is much lessened, now that by statute law :(*r*)

1st. A widow is not entitled to dower out of any land which has been absolutely disposed of by her husband in his lifetime, or by his will

(*q*) App. No. 27. 1 Eden, 132.

(*r*) 3 & 4 W. 4, c. 105.

2d. That all partial estates and interests, and all charges created by any disposition or will of a husband, and all debts, incumbrances, contracts and engagements to which his land shall be subject or liable, shall be valid and effectual as against the right of his widow to dower.

3d. That a widow shall not be entitled to dower out of any land of her husband, when in the deed by which such land shall be conveyed, or by any deed executed by him, it shall be declared that his widow shall not be entitled to dower out of such land.

4th. That although he die intestate, wholly or partially, *he may defeat her right by a declaration of his ['301] intention, by a will duly executed for the devise of real estate.

5th. Or he may, in like manner, subject her dower to any conditions, restrictions or directions.

34. If a jointure be appointed subject to a condition not required by the power, *e. g.* that the woman shall release her dower, the husband may release her from the performance of the condition by any subsequent instrument.(s)

35. It is customary to give a man a power to jointure his wife in proportion to the fortune she brings ; for example, 100*l.* per annum for every 1,000*l.* ; and as the object of such power is that the estate may not be incumbered in favour of a woman who brings no fortune into the family, any underhand execution of it will be set aside ; a nominal portion is not sufficient ; as, if the husband or his friends advance money to make up the sum, it is afterwards repaid,(t) so although she has a portion, yet if it is settled to her separate use, it will not enable the husband to exercise his power,(u) so perhaps if it were settled on the husband for life only, remainder to the wife absolutely.

36. But it is not necessary that the portion should be paid, and absolutely expended by the husband, because that would put it out of his power to make a reasonable settlement of it on his family, and yet enable him to waste and squander it away ; therefore, where the portion is settled in a proper and reasonable manner for the benefit of the family, in the fair way of

(s) *Zouch v. Woolston*, 2 Burr. 1136.

(t) *Vide supra*, ch. 10.

(u) *Lord Tyrconnel v. Duke of Ancester*, Ambl. 237 ; 2 Ves. 560.

contracting, that is not within the reason of the cases on fraud and collusion. Upon these principles Lord Hardwicke determined, that a settlement of part of the wife's portion on the husband for life, remainder on the younger children of the marriage, and in case there should be no such child, on the survivor of the husband and wife, was not a fraud on the power, although the wife survived him, and there was no younger child, so that [*302] she herself eventually became entitled to her portion as well as her jointure.(x)

37. In a late case, where an estate was devised to several persons and their issue male, in strict settlement, with a power to the tenants for life to jointure according to the amount of the wife's portion upon condition that not less than two-thirds of the portion should be settled, "one-third upon the eldest son of the marriage, and one other third upon the younger children" Lord Eldon determined that a life interest in two-thirds might be reserved to the husband; and that the interest of an eldest son might be divested in case of his death without issue male under twenty-one.(y)(1)

38. Under a power of this nature, the tenant for life cannot bind the estate in the hands of the remainder-man in respect of any part of his wife's fortune, not received or ascertained till *after his death*, for the estate might otherwise be burthened with jointures, to take effect upon remote contingencies, or possibilities of further portions coming in. But if it be agreed, that in consideration of such future jointures the wife's future property shall belong to the husband, as she cannot have the recompense in consideration whereof it was agreed she should part with it, she will be entitled to retain such property herself.(z)

39. We have elsewhere considered what will be deemed a

(x) Lord Tyrconnel v. Duke of Ancaster, ubi sup.

(y) Burrell v. Crutchley, 15 Ves. jun. 544; Fearne's Posth. 350.

(z) Holt v. Holt, 2 P. Wms. 648; vide supra, p. 131.

(1) In Brograve v. Winder, 2 Ves. jun. 634, a direction in a will that the daughter's legacy should before marriage be settled on her for life, and after her death "upon her issue, or in default of issue, upon her right heirs," was held to warrant a settlement upon the husband and wife successively for life; then for the children *as they should appoint* in default of appointment, to the children equally: if no child, according to their joint appointment: in default thereof to the husband absolutely. But see 15 Ves. jun. 551. 555.

fraudulent execution of a power. Most of the cases have turned upon the power of jointuring.(a)

*40. But although a man upon his death-bed exercise [*230] a power of jointuring, as Mr. Wycherley did, really with a view to obtain a portion and not a wife, yet the execution cannot be deemed fraudulent. This was decided by Lord Parker, assisted by Lord C. J. Pratt and Sir Joseph Jekyll, Master of the Rolls, upon a bill filed by the remainder-man to be relieved against the jointure made by the tenant for life even upon his death-bed, in consideration of, and previous to his marriage, by virtue of the power reserved to him.(b) Lord Hardwicke states it as a case in which the remainder-man refusing to join and charge the estate with the tenant for life's debts, he said "I will marry and execute my power.(c)(I)

(a) Vide *supra*, ch. 11.

(b) See *Wicherley v. Wicherley*, 2 P. Wms. 619, cited; *Lane v. Page*, Ambl. 225; App. No. 26.

(c) See Ambl. 234.

(I) In Wycherley's life it is said, that he had often declared that he was resolved to die married, though he could not bear the thoughts of living married again; and accordingly, just on the eve of his death, he married a young gentlewoman of 1,500*l.* fortune, part of which he applied to the uses he wanted it for; eleven days after the celebration of these nuptials he died.

[*304]

*CHAPTER XVII.

OF POWERS TO LEASE.

WE now come to an important branch of our subject, of which much has been necessarily anticipated. It remains only to consider: 1. The general rules of construction applicable to this power, under which head we may introduce such scattered points as do not properly fall under the succeeding heads; 2. What may be demised under different powers; 3. For what term; 4. At what rent; and, 5. Subject to what covenants and conditions.

[*305]

*SECTION I.

OF THE GENERAL RULES OF CONSTRUCTION APPLICABLE TO THIS POWER.

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| 2. General rule of construction. | 18. Lessee and assignee bound by covenant to repair in void lease. |
| 3. Application of decisions under enabling and restraining statutes. | 19. Lease may be granted to a trustee for the lessor. |
| 4. Where suspended or extinguished. | 20. Power may be executed toties quoties. |
| 5. Contracts for leases under powers enforced: no decree for damages. | 21. Where lease will cease on non-payment of rent. |
| 6. Void lease not set up by acceptance of rent. | 23. To whom the power extends. |
| 7. But it renders notice to quit necessary. | 24. Where building lease not authorized by articles. |
| 9. Same rules apply to equitable estates. | 25. Where powers of leasing are authorized. |
| 10. When a lease operates out of the interest and may be confirmed. | 26. Power by statute to infants and females covert to renew. |
| 11. Confirmation by a tenant for life not binding upon remainder-man. | 27. Like power to infant to lease his own estate. |
| 12. If lessee allowed to rebuild, &c., by remainder-man, the latter is bound. | 28. And to committees of lunatics. |
| 15. No relief in equity of compensation for expenditure. | 29. How trustees of a power of leasing should act. |
| 17. Acceptance of rent under void lease does not bind remainder-man by a covenant to renew. | 30. Operation of a lease under a power, and of covenants in it. |

1. LORD MANSFIELD truly observed, (a) that of all kinds of

(a) 1 Burr. 120, 121.

powers, the most frequent is that "to make leases." For the encouragement of farmers to occupy, stock and improve the land, it is necessary they should have some permanent interest. Unless the owner of the estate for life was enabled to make a permanent lease, he could not enjoy, to the best advantage, during his own time; and "they who come after must suf- [*306] fer, by the land being untenanted, out of repair, and in a bad condition. The plan of this power is for the mutual advantage of possessor and successor. The execution thereof is checked with many conditions, to guard the successor, that the annual revenue shall not be diminished, nor those in succession or remainder at all prejudiced in point of remedy, or other circumstances of full and ample enjoyment.

2. Formerly a distinction used to be taken between a power to a stranger having a particular estate, and a power reserved by the owner of the fee, which latter it has been said, is to receive a more liberal construction than the other. But this doctrine, which has so direct a tendency to introduce different decisions on the same words, appears to be completely exploded at the present day. The question, Lord Ellenborough observed, in *Hawkins and Kemp*, which turned upon the power of revocation, should depend upon what is a fair construction of the clause giving the power, in making which the Court is to decide according to what they shall judge to be the intention of the parties, not restraining or lessening the power by a narrow and rigid construction, nor by a loose and extended interpretation dispensing with the substance of what was meant to be performed. (b) An opinion has, however, prevailed that a power of leasing is to receive a more strict construction than any other power, (c) and that equity cannot relieve against a defect in the execution of it; but we have already seen that this relief is administered in proper cases, (d) and the books abound with authorities in favour of the liberal construction of this power. Lord Mansfield, whose authority is generally quoted in favour of the rigid construction, (e) seems merely to have meant that the power must not be abused. (f) Lord Chancellor Cowper thought the power was to

(b) 3 East, 441.

(c) See *Fitz.* 219; 3 Vin. Abr. 431.

(d) Vide *supra*, p. 131.

(e) See 1 Burr. 121.

(f) *Dougl.* 573; 1 Blackst. 449.

[*307] be taken *strictly :(*g*) but Lord Chief Justice Holt, in the same case, was of a contrary opinion, (*h*) and that was the opinion of Bridgman, C. J. (*i*) Lord Kenyon has decided that the *intention of the parties* must govern in the construction of this power, (*k*) and Lord Redesdale has shown, upon very solid grounds, that the power must receive as liberal an interpretation as a power of jointuring or any other power. (*l*) In the construction, therefore, of powers of leasing we may call in aid the rules established in regard to other powers.

3. The decisions upon leases by tenants in tail and ecclesiastical persons, under the statutes, have been said to apply with equal force to leases under powers in settlements; but this position is certainly not well founded: in several instances those decisions even differ from each other, according to the words of the statutes upon which they severally arose. In the course of the ensuing inquiry it will appear generally how far those determinations apply to the subject before us.

4. We have already seen where a power of leasing is suspended or extinguished. (*m*)

5. And we have seen that an agreement in writing by a donee of a power of leasing, to grant a lease warranted by the power, will bind the remainder-man, who will also be entitled to enforce it: (*n*) but that a parol agreement cannot be enforced against him. A lessee being considered as a purchaser *pro tanto*, is in like manner entitled to have a defective lease made good against the remainder-man, where the defect is in form and not in substance. (*o*) Thus if the term is longer than the power authorizes, it will be sustained *pro tanto* in equity : (*p*) so if the lease ought [*308] to be in possession, 'but an old lease, although abandoned, has not been surrendered, equity will consider it

(*g*) See 3 Cha. Rep. 73

(*h*) Ibid. 69, 70.

(*i*) Bridg. by Ban. 90, 91

(*k*) 3 Term Rep. 675.

(*l*) 1 Sch. & Lef. 61; vide supra, p. 138; and see 2 Brod. & Bing. 605, per Lord Eldon.

(*m*) Vide supra, vol. 1, p. 56.

(*n*) Supra, p. 121. 123.

(*o*) Ibid.

(*p*) Supra, p. 75.

as done, and support the lease ;(q) but if the lease, which ought to be in possession, is *in futuro*,(r) equity cannot aid.

In a case where there was an imperfect parol agreement, which was held not to be binding on the remainder-man and the tenant, on the faith of the contract, had expended a large sum in building, equity refused to give him any compensation for his expenditure against the assets of the tenant for life ; for that would be a decree merely for damages, and not a compensation for the benefit his estate had received.(s)

6. Where a lease is granted which is void under the power, no acceptance of rent by the remainder-man can set it up ; for, though an acceptance of rent may make a *voidable* lease good, it cannot make good a lease which was actually *void* at first.(t) Now, if a man having a naked power make a deed or a lease not warranted by his power, such deed or lease is certainly void, and not voidable only.(u) In *Doe v. Butcher*,(v) a tenant for life, without a power of leasing, granted a long lease for years, determinable on the lives of the lessee and two other persons. The lessee, after the death of the lessor, laid out considerable sums of money in improving the lands ; and more than twenty years after the death of the tenant for life, the remainder-man upon the dropping of a life granted a new lease to the lessee, from and after the death of the lessee and the other life, for ninety-nine years, if a new life should so long live, and afterwards granted another like lease upon the dropping of a new life, and the lessee paid his rent to the remainder-man for about thirty years, and [*309] rendered heriots, and was treated as a tenant of the manor ; but the acts were held not to operate at law, as a confirmation of the first lease, or a new grant ; and the decision would have been the same had the lease been badly granted under a power.

7. The acceptance of rent, however, *as rent*, will operate as an

(q) *Supra*, p. 137.

(r) *Ibid*.

(s) *Blore v. Sutton*, 3 Mer. 237. See 1 Scho. & Lef. 74 ; *Stanford v. Omy*, ib. 65. cited.

(t) *Jones v. Verney*, Willes, 169 ; *Doe v. Watts*, 7 Term Rep. 83 ; and see *Doe v. Butcher*, Dougl. 50 ; *Bowes v. E. L. Waterworks Company*, Jacob, 324.

(u) Per Willes, C. J., Willes, 177.

(v) Dougl. 50 ; and see *Goodright v. Humphreys*, Dougl. 52, n.

admission by the remainder-man that the lessee is his tenant, and in that case he is entitled to notice to quit.(x) So the acceptance from the tenant of any service reserved by the lease, as the carrying of coals to the lessor's house, will of course have the like effect.(y)

8. But this is a point to be decided by a jury. In a late case the Court thought, that though the receipt of rent is some evidence of a tenancy, yet that if the rent paid were greatly disproportionate to the actual value, the jury, although it would be peculiarly their province to decide, would probably receive a very strong direction to decide *against* a tenancy.(z) The fair inference, however, of a tenancy by receipt of rent, ought not, it may be thought, to depend upon the quantum of rent.

9. The same rules would prevail *as to confirmation*: where the lessor had full legal ability to grant the lease out of his interest, but an insufficient equitable power, as in the instance of a trustee of the fee, with a limited equitable power,—the receipt of rent by the *cestui que trust* would not of itself confirm the lease in equity:(a) and if the lease were merely of the equitable estate, yet the receipt of rent by the equitable remainder-man would not make the lease good.(b)

10. Sometimes, although a power not being pursued will not support a lease granted by a donee, yet it will not prevent it from operating out of his interest, with or without confirmation. ['310] Thus, if a tenant for life, with remainder to such uses as he should appoint generally, and with a limitation to himself in fee in default of appointment, were to grant a lease not authorized by the power, it would without any further act operate by force of his interest; and where an estate was so limited in favour of a married woman, and she and her husband granted a lease not warranted by the power, and she received rent after her husband's death, the lease was held to be only voidable, and her receipt of rent after her husband's death confirmed it; and a will made by her under her power, *prior* to

(x) Doe v. Watts, ubi sup.

(y) Doe v. Morse, 1 Barn. & Adol. 365.

(z) Roe v. Prideaux, 10 East, 158.

(a) Bowes v. E. L. W. W. Company, 3 Madd. 375; Jacob, 324.

(b) Willes, 176, 177.

granting the lease, was considered *pro tanto* revoked by the lease.(c)

11. If a remainder-man is himself but tenant for life, no act of confirmation by him can bind those in remainder after him.(d)

12. But if, as we have seen, a remainder-man lies by, and suffers the lessee to rebuild, equity will compel him to grant a new lease, although the covenants in the existing lease will be reformed, if necessary.(e)

13. So it has been said, that if a remainder-man, when he succeeds to the property, does, with the full knowledge of the imperfection of the leases, and in consideration of the lessees agreeing to continue tenants, consent to leave them undisturbed, that would amount not to a confirmation of the lease, because he could not confirm for those who stood behind him, but to an agreement by which he would be bound for his life, if the leases continued so long.(f)

14. The act of one remainder-man clearly would not bind another after him. If one tenant for life allow the lessee to make improvements, and a remainder-man, when he comes into possession, allow the lessee to take the benefit of them, it would be no ground for saying that the latter ought *not [*311] to set aside the lease; and improvements, to bind a man, must of course be made with his knowledge.(g) If the lease cannot be supported, there can be no compensation for the improvements.(h)

15. In *Jones v. Verney*, the Court were of opinion, that although the lessee had built, yet as he was not bound as he ought to have been by his lease to build, his voluntary act would not make good the lease. But they confined this to law, and said that this, though it could make no alteration at law, might in equity, for the lessee, if evicted, would probably be able to obtain satisfaction there for the lasting improvements which he had made. But such is not the rule in equity, for the assets of the

(c) *Doe v. Weller*, 7 Term Rep. 478.

(d) *Bowes v. E. L. W. W. Company*, ubi sup.

(e) *Stiles v. Cowper*, 3 Atk. 692. See 1 Sch. & Lef. 72.

(f) 3 Madd. 384, per Leach, V. C.

(g) *Jacob*, 381, 382, per Lord Eldon.

(h) *S. C. and Blore v. Sutton*, 3 Mer. 237.

lessor could not be charged, unless under some express covenant in the lease; and of course the remainder-man, who had simply received the rent, would not be so liable.

16. At the end of *Doe v. Butcher*, the learned Reporter queries whether in that case the tenant might not have been relieved in equity. Clearly there was no ground for equitable interference, unless the expenditure by the lessee in improvements was with the knowledge of the remainder-man, and of a nature and to an extent to entitle the lessee to relief.

17. Where a lease not warranted by the power contains a covenant for perpetual renewal, the reversioner, by accepting for many years the rent reserved by the lease, does not bind himself to perform the covenant.(i)

18. But although a lease under a power be void, yet an enjoyment of the estate accompanied by a payment of the rent, will bind even an assignee of the lease, who has not re-assigned, to repair to the end of the term if there be a covenant to that effect in the void lease. For although the lease is void, yet [*312] if a party hold the property to the end of the term and continue to pay the rent, he is liable to all the stipulations contained in the lease, in the same way as a tenant, who holds over upon the expiration of a valid lease. He cannot of course be sued in covenant, but the occupation on the terms of the lease furnishes the measure of damages. But the implied assumpsit to repair does not extend beyond the period of the lease.(j)

19. Where the terms of the power are complied with, it is no objection that the lease is granted in trust for the lessor himself, for that is a question merely between the parties. It is just the same thing as between the lessor and the successor, where *the legal tenant* is bound during the term in all requisite covenants and conditions.(k)

20. It is of the very nature of this power that it may be exercised *toties quoties*. The object is, *subject to the restrictions*, to place the tenant for life in the situation of an owner in fee. Bridgeman, C. J., said, that in *Leper and Wroth* it was agreed

(i) *Higgings v. Lord Rosse*, 2 Bligh, 112.

(j) *Beale v. Sanders*, 3 Bing. N. C. 850.

(k) *Wilson v. Sewell*, 1 Blackst. 617; *Earl of Cardigan v. Montague*, App. No. 13; *Taylor v. Horde*, 1 Burr. 60.

(as he had it in a good report of that case,) that though the power was indefinite to make leases for twenty-one years, without the words *toties quoties*, yet when one lease so made was expired, the lessor by virtue of his power might make another lease in possession, though he could not make a reversionary lease. (l)

21. A power to lease will not, without an actual necessity, be construed to authorize a lease only whilst the rent is paid, so that for non-payment it will cease in point of limitation; (m) nor will a lease itself be so construed, if by fair construction, instead of becoming void by non-payment, it may be considered voidable at the election of the lessor by re-entry.

*22. But where the power was to make leases for [*313] lives or years, reserving the rents then yielded, so long as the lessees, their executors and assigns, should pay their rents and perform their covenants according to the true meaning of their indenture of lease, and the leases granted had the same words inserted in them, and the rents were in arrear, but were paid within a month, and there had been no demand, it was held that the words *so long as*, &c. were words of limitation, and therefore the leases determined upon non-payment of rent at the day. (n) It was of course agreed that the leases would not have been valid if the lessees had not been made subject to the limitations in the power; and it was held that equity could give no relief to the lessee in such a case. (o)

23. Whether a power of leasing extends to all the persons entitled under the instrument creating it, or only to some in particular, depends not upon the place where the power is inserted, but upon the fair construction of the whole instrument taken together. (p) Where a power is general, the Court cannot confine it, unless upon the due construction of the whole instrument.

24. In a case (q) where the articles before marriage stipulated that the settlement should contain a power of leasing for twenty-

(l) *Bridg. by Ban.* 97.

(m) *Berry v. White, Bridg. by Ban.* 82.

(n) *Tristram v. Lady Baltinglass, Vaugh.* 28; *T. Jo.* 27, *nom. Tustian v. Lady Baltinglass.*

(o) *Temple v. Lady Baltinglass, Finch.* 275.

(p) See *Forster v. Graham*, 2 Str. 961; 2 Barn. B. R. 341. 428; *Right v. Smith*, 12 East, 455. See *Collett v. Hooper*, 13 Ves. jun. 255.

(q) *Pearse v. Baron, Jac.* 158.

one years in possession, a power of sale and exchange, of appointing new trustees, "and all such other powers, provisoes, clauses, covenants and agreements as are usually inserted in settlements of the like nature," it was held that a power to grant building leases for the usual term was not authorized by the articles.

25. A stipulation in articles for a settlement of estates in Ireland, that the settlement should contain all the cove-
[314] nants, provisions, and conditions usually contained in marriage settlements in England, was held to authorize proper powers of leasing, and it was referred to the Master to inquire whether proposed powers to lease for thirty-one years at rack-rent, and to renew leases containing covenants for perpetual renewal, and to lease for lives or for years determinable upon lives at rack-rent, and to grant building and repairing leases and leases of mines, were usual powers in that part of Ireland where the estates were situated, and whether there were any circumstances connected with the property which rendered it expedient and for the interest of all parties that such powers should be introduced.(r)

26. We may here notice a provision in the 1 Will. 4, c. 65, s. 16, by which, where an infant or a feme covert might, in pursuance of any covenant or agreement, if not under disability, be compelled to renew any lease made or to be made for the life or lives of one or more person or persons, or for any term or number of years absolute or determinable on the death of one or more person or persons, it is made lawful for such infant or his guardian in the name of such infant, or such feme covert, by the direction of the Court of Chancery or Exchequer, to be signified by an order to be made in a summary way upon the petition of such infant or his guardian, or of such feme covert, or of any person entitled to such renewal, from time to time to accept a surrender of such lease, and to make and execute a new lease of the premises comprised in such lease, for such number of lives, or for such term or terms of years determinable upon such number of lives, or for such term or terms of years absolute, as was there mentioned in the lease so surrendered at the making thereof, or otherwise as the Court by such order shall direct.

(r) *Duke of Bedford v. Marq. of Abercorn*, 1 Myl. & Cra. 312.

27. And by another provision of the same act,(s) it is *provided, that where an infant is entitled to any [*315] land, &c. in fee or in tail, or to any leaseholds for an absolute interest, and it shall appear to the Court of Chancery or Exchequer to be for his benefit that a lease or underlease should be made of such estates for terms of years, for encouraging the erection of buildings thereon, or for repairing buildings actually being thereon, or the working of mines, or otherwise improving the same, or for farming or other purposes, it shall be lawful for such infant, by the direction of the Court, to be signified by an order to be made in a summary way upon the petition of such infant or his guardian, to make such lease of the property for such term or terms of years, and subject to such rents and covenants, as the Court shall direct, but in no case shall any fine or premium be taken; and in every such case the best rent that can be obtained, regard being had to the nature of the lease, shall be reserved upon such lease, and the leases and covenants and provisions therein shall be settled and approved of by a Master of the said Court, and a counterpart of every such lease shall be executed by the lessee or lessees therein to be named, and such counterpart shall be deposited for safe custody in the Master's office until such infant shall attain twenty-one, but with liberty to proper parties to have the use thereof if required in the mean time, for the purpose of enforcing any of the covenants therein contained; provided that no lease be made of the capital mansion-house, and the park and grounds respectively held therewith, for any period exceeding the minority of any such infant.

28. We have already seen that committees of lunatics are, in certain cases, authorized to exercise powers of leasing vested in the lunatic.(t)

29. Where trustees are invested with a power of leasing, they must act in the exercise of it precisely as if the estate was given to them in trust to let.(u)

*39. A lease granted under a power, like every other [*316] estate so raised, takes effect as if it were contained in the instrument creating the power; and therefore, in the common

(s) 1 W. 4, c. c. 65, s. 17.

(t) 1 W. 4, c. 65, s. 23. Vide *supra*, vol. 1, p. 226.

(u) See *Sutton v. Jones*, 15 Ves. jun. 588.

case of a lease by a tenant for life under a power, it precedes, like a common lease, the estate of the person granting it, and he takes the reversion expectant upon it ; and every remainder-man's estate, as it takes effect in possession, stands in the same relation to that of the lessee, and the rents and covenants, and benefit of provisoes for re-entry and the like, go to the persons entitled under the settlement, in their regular succession ;(x) and covenants authorized by the power and entered into by the lessor bind the remainder-man, and it is upon that ground that, as we shall see, the insertion of an improper covenant avoids the lease : they may properly be considered as running with the land, but they are generally such as the lessee can himself reap the benefit of without action or suit.(y) Such a lease of course, operating by way of use, at once gives the lessee an actual estate, and the lessor a divided reversion, without the necessity of a previous entry.

[*317]

*SECTION II.

WHAT MAY BE DEMISED UNDER DIFFERENT POWERS.

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| 2. What are lands usually letten. | 20. Distinction between opened and un- |
| 5. By whom the lettings should have been made. | opened mines. |
| 7. Embrace every species of demise. | 21. Right of sporting over part not let, bad. |
| 8. Where lands not before let are not within the power. | 22. Extent of a power to let lands let for lives. |
| 14. Where they are within it, and may be let without rent. | 23. Extent of an exception of demesnes. |
| 18. Observations on the cases. | 24. Property leased should be properly described. |
| 19. Evidence of former lettings. | |

1. It is seldom that any question on this head arises at the present day, except upon wills unskilfully penned ; for the power usually

(x) Whitlock's case, 8 Rep. 69 b. post; 10 Ves. jun. 256, per Lord Eldon; Butler's n. to Co. Litt. 214 a; Harcourt v. Pole, 1 And. 273; Isherwood v. Oldknow, 3 Mau. & Selw. 382, post.

(y) Goodtitle v. Funucan, Dougl. 565; Isherwood v. Oldknow, ubi sup. infra.

introduced in modern settlements is to lease all the hereditaments comprised in the deed at the best rent, and if the mansion-house, park, or any other part, is not intended to be leased, it is expressly excepted in the power. However, the cases must be stated which have arisen in regard to the subject over which the power rides.

2. Where a power extends to lands *usually* letten, lands which have been twice or thrice letten are within the power ;(z) but the land which has only been once letten is not, we are told, within the proviso, for *usus fit ex iteratis actibus*.(a) And it is said, that if land has been let by a contract from year to year, for three years, it is not within the power, for it is but one lease.(b) But Lord Chief Justice Vaughan, upon citing this case of a single demise,(c) said that he did not much insist upon it, for the words ‘*usually* demised’ may be taken in two senses ; the one, for the ‘often farming, or repeated acts of leasing lands, [*318] the other, for the common continuance of land in lease, for that is usually demised, and so land leased for five hundred years long since, is land usually demised that is in lease, though it have not been more than once demised, which, he justly added, is the more received sense of the words land *usually demised*. Indeed, the common sense of mankind must revolt at a distinction which considers lands leased for one hundred years as not usually demised because the term was granted by one deed, but allows land to come within that description which has been let for two years only, on two distinct lettings.

3. In the case of *Tristram and Lady Baltinglass*, the power was “to demise all or any of the premises which at any time heretofore have been *usually letten*, for three lives, or any number of years determinable on three lives, reserving the rent thereupon now yielded and paid.” The settlement was made in the twelfth of Jac. and the jury found the lands in question to have been demised in the twelfth of Eliz. for twenty-one years, and that term was expired, *and they had not been demised for the space of twenty years before the settlement* ; and the Court held that they were not within the power. The word *usually*, excluded demises

(z) 2 Ro. Abr. 261, pl. 11, 12; Vaugh. 33.

(a) 2 Ro. Abr. 263, pl. 13.

(b) 2 Ro. Abr. 262, pl. 14; contra P. 2 Ja. B.

(c) See Vaugh. 28; Tho. Jones, 27.

at a great distance of time, and the words "any time" in this case, meant "at *all* times." And what was not farmed twenty years before could not be said to be at any time before commonly farmed; for those twenty years was a time before in which it was not farmed. And the power requiring the rents *then* reserved to be made payable, necessarily implied that the land, demisable under the power was land which was then under rent. *(d)* The case of *Foot v. Marriot*, *(e)* which, although it turned upon special words, was a case to the like effect, was decided the same way by Lord Chancellor King, assisted by Lord Chief [*319] Justice Raymond, *Mr. Justice Denton, and Mr. Baron Comyns, simply upon the authority of *Tristram and Baltinglass*.

4. This last case, we must observe, did not decide *affirmatively*, that land demised within twenty years was subject to the power, but merely that land not demised within that period was not subject to the power. It remains to be decided within what period the land must have been demised. The Courts might probably incline to fix twenty years as the limit, by analogy to the enabling statute of 32 H. 8, c. 28, which in a similar case considered that as a reasonable period.

5. Upon this statute it has been very properly determined, that the lettings to which it refers are by some person seised of an estate of inheritance, and not by tenant by the courtesy, dower, &c. *(f)* But the same doctrine cannot be applied to powers in private settlements, although a contrary opinion has been entertained. The act of Henry was intended to have a general and perpetual operation, it was therefore absolutely necessary to establish by whom the lettings must have been made, so as to authorize subsequent demises, and it would have ill accorded with the true spirit of the act to have holden that demises by persons having partial interests only constituted the standard to which the statute refers. But in the case of a power raised by a private settlement, the party creating it must be considered to know that the lands have been in lease, and by whom the leases were granted, and therefore, when he authorizes the lands *usually*

(d) 2 Jo. 27; Vaugh. 28; 1 Freem. 23. As to the last ground, vide *infra*.

(e) 3 Vin. Abr. 429, pl. 9.

(f) Co. Litt. 44 b; Dy. 271 b, pl. 28.

demised to be leased, to what can he refer unless to the leases which have been theretofore actually granted? If he disapprove of any lands being let, which usually have been leased, it behooves him to expressly declare his intention by excepting them out of the power.

6. In *Right v. Thomas*, (g) a power in a settlement made in 1737 to lease for one, two, or three lives, or [*320] for years determinable on one, two, or three lives, any part of the estate which had been *usually so letten*, so as such rent as had been given or received for twenty years past, &c., were reserved, was held to warrant the demise of an estate which in 5 Jac. 1 had been demised in reversion for ninety years, determinable on three lives, (I) and in 1638 had been limited by the owner by covenant to stand seised, after an estate for life to himself, to his son for ninety-nine years, if he or any wife of his, or any issue he might have, should so long live, paying yearly unto the heirs and assigns of the settlor, the yearly rent of 4*l.* quarterly, and the son covenanted to pay the rent and perform the covenant; which term commenced in 1643, and ceased in 1738, so that at the time of the settlement the lease was in being. The Court seems properly to have considered that the lands had been let as required, and that the limitation in the settlement was in all respects a lease: the lessor's bounty to his child arose not from granting the lease, but from remitting the fine.

7. Upon the construction of the words *usually demised*, it has been determined that they embrace every species of demise—at will, from year to year, or for years, or lives, and whether granted by parol or by deed, by copy of court-roll, covenant to stand seised, or any other instrument: (h) but whatever the instrument, it must operate as a lease in the sense of the term demise in the given power.

8. We have before seen that one point relied on in *Lady Baltin-glass's* case was, that the *rent then reserved* was to be made

(g) 1 Blackst. 446; 3 Burr. 1441. See the note to the last edition, and *Doe v. Halcombe*, 7 Term Rep. 713; post.

(h) Co. Litt. 44 b; *Baugh v. Haynes*, Cro. Jac. 76; S. C. 6 Rep. 37, nom. *Dean and Chapter of Worcester's* case; S. C. Mo. 759, nom. *Banks v. Brown*; *Right v. Thomas*, 3 Burr. 1441; 1 Blackst. 446.

(I) In *Burrow* it is stated, that there were leases in H. 8th's time, some for terms of years, and some for 99 years, determinable on three lives, at different rents.

payable, which the Court thought necessarily implied [*321] "that the land demisable under the power was land which was *then* under rent.(i) And in Lord Mountjoy's case, where it was declared by a private act of parliament that no alienation should be made but only leases, &c., "yielding the true and ancient rent," it was determined that land could not be leased which had never been demised before. For how, it was asked, could a rent be called *the true and ancient rent* when it issued out of a thing which was never charged with any rent by any reservation before?(k)

9. So in the case of Bagot and Oughton, which underwent great consideration, the power was to lease "*all or any of the premises, at such yearly rents, or more, as the same are now let at;*" and a lease was made of the capital mansion-house, which was the family seat, and the demesne lands, which were never leased before. And it was determined, principally on the authority of Lady Baltinglass's case, that the lease was void, although it was forcibly argued that *all* the lands were authorized to be leased; and the subsequent words were only explanatory of the first part of the sentence, "that the lands usually let may be let at the usual rent."(l)(1)

10. Lord Mansfield, addressing himself to this case, observed, that(m) the nature of the things showed that the power could not be meant to extend to letting the ancient manor house at all, much less to letting it without reserving any rent. In a family settlement of an estate, consisting of some ground always occupied, together with the seat, and of lands let to tenants upon rents reserved, the qualification annexed to the power of leasing, that the ancient rent must be reserved, manifestly excludes the [*322] mansion-house, and "lands about it, never let. No man could intend to authorize a tenant for life to deprive the representative of the family of the use of the mansion-house. The words, in such a case, show that the power is meant to ex-

(i) *Supra*, p. 318.

(k) 5 Rep. 3 b; Mo. 197.

(l) 8 Mod. 249; Fort. 332.

(m) Dougl. 573, 574.

(1) This decision is said to have been affirmed in the House of Lords; but the case is not in Brown: and, after a diligent search, I have not been able to meet with it amongst the printed cases of that period.

tend only to what has been usually let. By that means the heir enjoys all the premises in the settlement just as they were held and enjoyed by his ancestor, the tenant for life: He has the occupation of what was always occupied, and the rent of what was always let. The Court, Lord Mansfield added, all therefore agreed as to the rectitude of the decision in *Bagot v. Oughton*. The nature of the thing spoke intent as forcibly as the most direct words could have done. It was demonstration.

11. In a later case under Sergeant Maynard's will, the power was to lease all or any of the tenements devised, for one, two, three or four lives or years so determinable, in possession or reversion, and under the new rents now reserved; and the like agreement, as in the leases now in being, and by the present tenants thereof respectively to be performed: and there was a power of leasing for seven years at rack rent. An estate had been out upon a lease for lives when the Serjeant purchased it, but the lives dropped before he made his will, and it was in his possession at his death; and the Master of the Rolls, and afterwards Lord Chancellor King, assisted by Raymond, C. J., Denton, J., and Comyn, Baron, held that a lease granted of this property under the power was bad, relying upon the cases before cited. (*n*)

12. In a modern case on this subject a similar decision was made. A man by his will devised his estate in strict settlement, and gave a power to lease *all or any* of the said manors, messuages, lands, tenements and hereditaments, for 'lives or years, [323] *so as the usual rents* were reserved. There were some tithes which were never leased before the making of the will, but some parts of the estate had been usually demised at rents; and the Court considered Lord Mansfield's observations on *Bagot and Oughton* to apply most pointedly to the case before them, as the tithes never had been let, but had always been occupied by the possessor of the estate; and they accordingly determined that the power did not embrace the tithes. (*o*)

13. In the last case (*p*) on this point there were two descriptions of land, some which had been demised previously to the will, and

(*n*) *Foot v. Marriot*, 3 Vin. Abr. 429, pl. 9; which case, although a very considerable authority on this head, has hitherto unaccountably escaped notice.

(*o*) *Pomery v. Partington*, 3 Term Rep. 665.

(*p*) *Dee v. Rendle*, 3 Mau. & Selw. 99.

some which had not : and the power was to lease all or any part of the property for not exceeding three lives, &c., so as there was reserved the accustomed yearly rent or rents, heriot and heriots, and other things usually paid. The power was to the trustees during minorities, and then to the tenant for life, &c. The Court treated it as a question of intention. They observed, that in *Bagot v. Oughton* the nature of the property proved the intention, and in this case they thought the intention as plainly proved by the character of some of the parties to whom the power was given. It was to the trustees that the power was in the first instance given, and they thought it never could have been intended that they who might have had an interest for a day only, and who were not intended to have any beneficial interest for themselves, should be able to alter the nature of the property, and prevent the tenant for life from occupying what the testator had always reserved for his own occupation.

14. But in all these cases the intention of the parties is to govern : and there are several instances in which parts of the estate never leased have, in favour of the supposed intention, been considered to be within powers requiring the ancient or usual, or present rents, to be reserved.

15. The first of these is *Cumberford's case*,^(q) [324] where, under a power to make leases of the premises, or any part thereof, “*so that as much rent, or more, was reserved upon each lease as was reserved in respect of it within the two years immediately preceding,*” it was resolved, that lands which had not been leased within the two years at any rent, might be leased by the donee at any rent he pleased, because it appeared by the generality of the words that it was intended he should have power to lease all the land. The Court, therefore, considered the restrictive clause as applicable only to such lands as had been demised two years before.

16. Upon the authority of this case, as it should seem, the case of *Waker, or Walker and Wakeman*, was decided.^(r) A power was given in a settlement of an estate to demise the premises, (which consisted of land, a rectory, &c.) so as *5s. an acre* were

(q) 2 Ro. Abr. 262, pl. 15.

(r) 1 Freem. 413; 2 Lev. 150; 1 Ventr. 294; 3 Keb. 544. 547. 586. 589. 619; and see *Campion v. Thorpe*, Clayt. 99.

reserved for *every acre* of the land demised. The rectory consisted of tithes only, and no glebe; and it was adjudged, that the power authorized a demise of the land at 5s. per acre, and of what did not consist of acres, as the rectory, without rent. And, upon the same principle, Lord C. J. Holt delivered an extra-judicial opinion, that under a power to lease an estate comprising a manor, so as the leases were not made of the demesne lands, and so as the ancient rent were reserved, the rents and services might be demised *without rent*, because it appeared to be the intent of the settlement that part of the manor might be demised; and, as the demesne lands were not comprised in the power, then the rents and services must be; for the whole of the manor consists in demesnes, rents and services; and he said, *if a man hath a power reserved to him of making leases of two things, and a qualification is annexed to the power, which cannot extend to one of these things, he may make a lease of that thing without any regard to the qualification.*(1) And he relied upon [325] Cumberford's and Waker's cases as authorities for these positions; but Turton and Eyre, J, thought, that as there were other lands mentioned in the power, they satisfied the words of it. (s)

17. In the case of *Goodtitle v. Fumuean*(t) the power in a settlement of manors, fishery, &c. was to demise all or any of the manors, fisheries,(u) messuages, lands, tenements, and hereditaments thereinbefore mentioned, *so as there were reserved so much rent, or more, than was then paid for the same.* The manors, or manorial rights, had not been let before. The fishery had been let before, but was not at the time of the settlement; since that time it had been again let at 15s. a year. A lease was made un-

(s) *Winter v. Loveday*, Com. 37; 1 Freem. 507; 1 Lord Raym. 267; 2 Salk. 537; Carth. 127; and see *Campion v. Thorpe*, Clayt. 99; *Campbell v. Leach*, Ambler. 740.

(t) Dougl. 565. See 1 Barr. 124.

(u) See 3 Term Rep. 671, n.

(1) Lord C. J. de Grey quoted this rule in *Campbell v. Leach*. The passage in Ambler, p. 748, should be read thus: Where there is a power of leasing (with a description) applicable to some parts of the estates, and not to all of them, those to which it is (not) applicable, may be leased without such description. Vide *supra*, page 124, n. It now appears from Mr. Blunt's edition, that in Serjeant Hill's MSS. the passage as above amended is correct. Where there is a power of leasing, and a restriction, applicable to some part of the estates, and not to all of them, those to which it is *inapplicable* may be leased without such restrictions.

der the power of the manors and *fishery*, and some lands, reserving the right of shooting and fishing, at a rent exceeding what they had ever produced before, about 30*l.*: and the Court held the lease to be valid. Lord Mansfield, in delivering the judgment of the Court, said “ that the power was express to demises, the manors and fisheries. They were particularly mentioned in the settlement, and the power went to the whole. They paid under this lease as great a yearly rent as at the time of the settlement, for they paid nothing then. The *words*, therefore, were complied with, and the objection *could only stand upon the in-

[*326] tent. But the court thought no such intent appeared.

The manors were nominal; of no value; no object of yearly income. The fishery only worth 15*s.* a year. They were convenient to the lessee living on the land, and of no use to the remainder-man. The right of shooting and fishing was reserved to him. For his own part, he thought the intent was to give leave to demise all, reserving as much rent *in the whole* as had been paid before, and in fact, 30*l.* more had been reserved.”(x)

18. These cases must not be dismissed without observation. The decision in *Cumberford’s* case has been referred to the *ita quod*, or *so that*, in the power,(y) and *Waker’s* case was distinguished by the Court from *Mountjoy’s*, on the ground that there the proviso was *disabling*; that no lease should be made but with ancient rent, whereas in the case before them the power was *enabling*, and the latter clause restrictive.(z) But these subtleties(I) are happily got rid of.(a) The intention of the parties, to be fairly collected from the whole instrument, is the only guide to the true construction of the power. Upon this broad ground it was that the case of *Goodtitle* and *Fumecan* was decided. If, then, in these cases we are to advert to intention, the value of the property must have considerable weight: for it is decided, that if

(x) And see 3 Term Rep. 677.

(y) See Fort. 332.

(z) See 3 Keb. 597.

(a) See 3 Term Rep. 677.

(I) In treating a distinction between a *disabling* and an *enabling* power as a subtlety, I allude only to those cases where it turns merely on the form of the words creating the power, for certainly there is a wide difference between a power *disabling* a tenant in fee from making any lease but for a certain time, and a power *enabling* a tenant for life, to lease for the same period. Vide *infra*.

the lands, tithes, &c. to which the restriction does not apply *are* within the power, they may be leased for the term prescribed without rent. The mischievous consequences of this construction are evident. The intention of a settlement may be entirely *defeated by it. The donee may lease lands, not [*327] letten before, without rent, taking a large fine at the expense of the remainder-man, whereas, in regard to those before letten, he is compellable to reserve the ancient rent. How incongruous and absurd is this rule, and how little calculated to effectuate the intention of the parties! Waker's case appears to have been decided solely on the authority of Cumberford's case, and Lord Chief Justice Hale said *if* it had been *res integra*, perhaps he should have been of another opinion,(b) and Mr. Justice Barclay seems to have entertained the same opinion;(c) and in the great case of Foot v. Marriot, Lord Chancellor King adopted Hale's view of Cumberford's case, and added, that *if* the case were law it should not be carried one step farther.(d) In all the modern cases, the Judges, without expressly overruling Cumberford's case, have clearly evaded the *spirit* of the decision. If the cases of Bagot and Oughton, Foot and Marriot, and Pomery and Partington, are well decided, it is still open to contend that the property to which the restrictive clause cannot apply, shall, if valuable, be rather held not to be within the power, than that the first tenant for life shall be authorized, contrary to the intention of the donor, to decrease the rental of the estate for his own particular emolument. The rule laid down by Holt, that "where a man hath power reserved to him of making leases of two things, and a qualification is annexed to the power, which cannot extend to one of these, he may make a lease of that thing without any regard to the qualification," may be a sound rule; but the question in these cases is, whether the qualification does not form a part of the sentence, and virtually exclude that subject to which, it is admitted, it cannot extend. There are, however, cases to which the rule ought to be applied; as, if in a power to lease estates, including mines opened and unopened, a clear intention *appears to embrace all the mines, but a [*328]

(b) Sec 2 Lev. 151.

(c) 3 Keb. 596.

(d) 3 Vin. Abr. 429, pl. 9.

clause is added, that no lessee shall be made dispunishable of waste, there, to effectuate the general intention of the power, the latter clause should not be deemed applicable to the unopened mines : (e) So if a similar clause be inserted in a power to grant leases at rack-rent, and building leases, it ought to be construed to extend to the leases at rack-rent only, because no improvements by building could be made, unless old buildings could be pulled down, trees felled, &c. Indeed, it even seems that such a clause in a power to grant building-leases only would not restrain the liberty of pulling down the old buildings in order to erect new ones. (f)

19. Where leases are granted under powers to lease lands usually demised, it must be shown, by old leases or other satisfactory evidence, that the lands have usually been demised, or they cannot be supported. (g)

20. In the cases of *Campbell v. Leach*, (h) it was determined that under a power to lease, the “messuages, lands, tenements, and hereditaments,” in the deed, (except the capital messuage and warren) at the best rent, but no authority was to be given to commit waste, opened mines might be leased, as they were in lease at the time of the settlement, and twelve years then to come of the term, and must be understood to have been settled for the benefit of all claiming under it, and the words were sufficient to carry the mines ; but the master of the Rolls held that the unopened mines could not be demised, as that would be an *authority* to commit waste : but the Judges before whom the appeal was heard appear to have avoided deciding the point.

21. Under the usual power to let the estates, hereditaments, and premises given to the tenant for life, he cannot demise a [329] part of the estate with a right of sporting over *the rest. And it was said the demise must be of the whole, which covers the part demised ; an easement cannot be granted by itself out of any separate part ; that would be subjecting the land to a servitude. (i)

(e) See and consider *Campbell v. Leach*, Ambl. 740; and keep in remembrance that it is not waste to work open mines; Co. Litt. 54 p.

(f) Vide *infra*.

(g) See *Earl of Cardigan v. Montague*, App. No. 13 (6).

(h) Ambl. 740.

(i) *Dayrell v. Hoare*, 12 Adol. & Ell. 356.

22. The usual power of leasing for lives authorizes a lease during co-existing lives only. *(k)* And where a power is limited to lease for any given number of lives such parts of the estates as are demised for *any such time*, it does not include lands which were then demised for lives, not concurrently, but successively, and by way of settlement. *(l)*

23. In the case of *Winter v. Loveday*, it was determined by Holt, Chief Justice, Turton and Eyre, against Rokeby, that an exception in a power of leasing of the demesnes of a manor, included the copyholds of the manor. Rokeby thought that the exception extended only to lands in the occupation of the donor. He, however, held, that if the demesne lands had *not* been excepted by express words, yet the power of leasing would not have extended to them, for if it did, it would destroy the tenure, because copyhold lands once leased, are forever enfranchised, and therefore, it shall never be presumed that the tenure was intended to be destroyed, without express words of the parties for that purpose. *(m)* This is an important general rule of construction applicable to every power.

24. The property demised ought of course to be so described as to throw upon a remainder-man no difficulty in ascertaining what it embraces. *(n)*

(k) Vide *infra*, sect. 3.

(l) *Doe v. Halcombe*, 7 Term Rep. 713 ; *Right v. Thomas*, 3 Burr. 1441, 1 Blackst. 446.

(m) Carth. 428, et sup.

(n) See Gilb. Rep. 61, 62.

[*330]

*SECTION III.

OF THE TERM WHICH MAY BE GRANTED.

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|--|---|
| 1. } Where a chattel interest depending | 8. Whether such a power to the lessee is |
| 4. } upon lives may be granted. | valid. |
| 2. Where only a lease for years or a lease | 14. What amounts to a power of leasing |
| for lives may be granted. | for an unlimited term. |
| 3. Where the lease need not be dependent | 18. For what lives a lease may be made. |
| upon lives. | 20. } Lease for lives or for years, where |
| 5. } A less term may be granted. | 21. } valid. |
| 6. } A power may be reserved to the lessor | 22. Lease for two lives good under power |
| 7. } to determine the lease. | to lease for three lives. |

SOME of the cases on this head have been unavoidably treated of in a former part of the work. (*o*) We may now inquire generally, 1. The term which may be granted; 2. For what lives the estate may be granted under powers to lease for lives; 3. In what cases leases in possession only can be granted; 4. In what instances leases in reversion may be granted; 5. Whether concurrent interests can be granted under the usual power of leasing.

1. We have already seen that a power to lease for lives will not authorize a lease for years determinable upon lives, but that under a general power to lease, with a proviso that the leases should not exceed three lives or twenty-one years, a lease for any term of years determinable upon lives would be good; for a lease for ninety-nine years determinable on three lives does not exceed three lives, although in truth it is not a lease for lives. (*p*)

2. So we have seen that a power to lease for any number of years not exceeding twenty-one years, or for the life or lives of any one, two, or three person or persons, so as no
[*331] *greater estate than for three lives be at any one time in being, authorizes a lease for years or a lease for lives, but not a lease for years determinable on lives. (*q*) The

(*o*) Vide *supra*, vol. 1, p. 491.

(*p*) Vide *supra*, vol. 1, p. 491; *Whitlock's case*, 8 Rep. 69 b.; *Berry v. White, Bridg. by Ban.* 100.

(*q*) *Supra*, vol. 1, p. 493; *Roe v. Prideaux*, 10 East, 158.

latter clause was held not to enlarge the first power, which was only to lease for years, not exceeding twenty-one in number.

3. And a power to lease if in possession for one, two, or three lives, or for the term of thirty years, or for any other number or term of years determinable upon one, two, or three lives, or in reversion for one or two lives, or for the term of thirty years, or for any other number or term of years determinable on one or two lives, was held to warrant a lease for thirty years absolutely. *(r)*

4. Again, a power to demise for three lives, or twenty-one years or under, or for any term of years, upon one, two, or three lives, or as tenant in tail in possession might do, was held to warrant a lease for ninety-nine years determinable upon three lives. *(s)*

5. Where a power is to lease for any term or number of years *not exceeding* a given number, a lease may of course be made for any term within the limit. *(t)*

6. So even if the power be to lease for any given term, as for twenty years, without saying *for any term not exceeding the number of years*, yet a lease may be made for a less term. *(u)*

7. And where a power authorizes leases for any term within a given limit, or for any term of years not exceeding twenty-one, a lease may be made for the term with a proviso that upon the tender by the lessor, the donee of the power of 1s. or the like, the lease shall be void: *(x)* or in other words, a lease may be made for a term certain, with a "proviso deter- [332] mining it in a given event, at the option of the lessor; but it would be otherwise if the power, as is sometimes the case, required the lease to be for a term absolute; that is fixed and not determinable. In *Cardigan v. Montagu*, where the clause of revocation was held good, the term was to be for any number of years absolute, not exceeding thirty-one years, or for any number of years determinable on lives; so that there the expression absolute was raised in opposition to a term depending not simply upon effluxion of time.

(r) *Supra*, vol. 1, p. 497; *Winter v. Loveday*, 1 Com. 37.

(s) *Supra*, vol. 1, p. 498; *Lutwich v. Piggot*, 3 Mod. 268.

(t) *Supra*, vol. 1, p. 496.

(u) *Isherwood v. Oldknow*, 3 Mau. & Selw. 582. S. C. MS. See *Harris v. Bes-sie*, 1 Keb. 347; *Bridg. by Ban.* 603.

(x) *Earl of Cardigan v. Montagu*, App. No. 13.

8. Whether a like power can be given to the lessee where the lease is required to be for a term absolute, in the proper sense of that term, has been a subject upon which judicial minds have differed.

9. In *Jones v. Verney*(*y*) the power was to lease for any term or number of years not exceeding sixty-one years, so as there should be reserved, to continue payable during the term, the rents, &c. and so as there was contained a condition of re-entry for non-payment of rent and the usual and reasonable covenants. A lease was granted for sixty-one years, and a power was given to the lessee, his executors, &c. at the end of forty years to determine the lease upon giving twelve months' notice to the lessor or the person for the time being entitled. The lease was held void because it was not properly a building lease, as required by the power. But the L. C. Justice in delivering the opinion of the Court, after two arguments, proceeded to show that the lease was not a building lease. The proviso likewise, he added, that the lessee should be at liberty to quit the premises at the expiration of forty years, affords another very strong argument to this purpose. *For though he did not think it made the lease itself void*, yet it showed plainly that this was not intended to be a building lease: for if the lessee had been to rebuild he would have been desirous to keep the premises as long as he could, and [*333] would never have desired a liberty *of quitting the premises before the end of the term. But this liberty could be inserted with no other view but lest the premises should become so ruinous before the end of the term that the lessee should not think it worth his while to keep the premises in repair at a great expense, and pay at the same time the best improved rent for them.

10. In *Lowe v. Swift*(*z*) the power was to lease for one, two, or three lives, or for any number of years, determinable upon such lives, not exceeding thirty-one years, to commence in possession, and not in reversion, at the best rent, with a counterpart, and a clause of distress and re-entry, and all other clauses and covenants usual between landlord and tenant. It was not necessary to decide the point: but Lord Manners expressed his opinion

(*y*) Willes, 169.

(*z*) 2 Ball & Beat. 536.

that a clause of surrender could not have been introduced in a lease under the power. Consider, he said, what would be the effect of such a clause: the tenant would be at liberty to hold the lands so long as they were profitable to him: but if the value of the lands should be depreciated by any circumstance, bad husbandry, bad times, or otherwise, the tenant would have a right to throw them up, to the prejudice of the remainder-man and the inheritance. He thought that to introduce such a clause would be a fraud on the power.(I)

11. In *Jack v. Creed*,(a) by a marriage settlement an estate was limited in strict settlement, "with the usual leasing power for three lives or thirty-one years, in possession, and not in reversion, and without fine or fines, or other benefit, for granting such lease or leases:" A lease for three lives was granted under the power, with a power to the lessee to surrender on any 1st day of May, after the expiration of the first five [*334] years of the term. The Court of King's Bench in Ireland held the lease to be void. The Court said, they had deliberated much upon it, and the result was that they thought that this was an undue execution of the power, and that the lease was void. The power given was the usual leasing power for three lives or thirty-one years, that is, for any term of years or lives not exceeding three lives or thirty-one years, it not being necessary that the lease should be for the full term mentioned in the power; *Isherwood v. Oldknow*, 3 Mau. & Selw. 382. But a lease for a life or lives absolutely, or for a term of years absolutely, was a very different lease from one for a life or years, with a clause empowering the tenant by a surrender to determine the lease. In the former case both parties were bound during the term: neither party could determine the lease without the assent of the other; and the *quantum* of the rent might be, and probably had been, fixed with a view to this circumstance, and the consequences of it. Though a long lease might in general be more beneficial to the tenant than a short one, yet the circumstance of being absolutely bound during the term was one that a prudent man would

(a) 2 Huds. & Bro. 128.

(I) In the argument it was said, Lord Redesdale treats such a clause as a fraud on the landlord. This is probably an error, and was intended to refer to what Lord R. said in 1 Scho. & Lef. 64.

advert to ; and there could be no doubt that a tenant would have preferred having it in his option to surrender his lease to being absolutely bound during the term. A lease for a term absolute, therefore, appeared to them to be very different from a term not absolute against the tenant, but absolute against the landlord. The prejudice, however, that might be sustained by the remainder-man, by reason of injury to the land, was the strong objection to such a clause. The tenant might by a course of husbandry adapted to that purpose exhaust the land, and surrender his lease when the land was so exhausted. It was true the clause contained a proviso that the premises should be surrendered in good repair, order and condition ; but a question might have been raised whether this proviso meant that the land should have been [335] properly tilled, and not deteriorated by taking successive crops and an exhausting course of husbandry ; and the landlord was not to be exposed to the trouble, expense and risk of trying such a question. Neither was it a sufficient answer that an action, in the nature of an action of waste, might be brought against the tenant. The remainder-man was not to be reduced to the necessity of bringing an action, nor to be exposed to the uncertainty of obtaining the fruits of any judgment he might recover. It could not be held that the power was well executed by the lease for three lives, and that the clause of surrender was a distinct and independent clause, which might be rejected, leaving the demise to stand without the clause of surrender. (According to *Adams v. Adams*, Cowp. 651, and that class of cases,) because the clause was incorporated with the demise, and must be considered as part of the consideration for the rent covenanted to be paid. For these reasons they thought the clause of surrender vitiated the lease, and that the lease being void the plaintiff was entitled to judgment.

12. And the Judges of the Common Pleas in Ireland came to the same decision in another case : but there was a great diversity of opinion amongst the Judges there upon the point. In the case of *Lord Muskerry v. Chimmery*, (1) where under a very general power to lease for any time or term of years, or lives, and with or without covenants for renewal, leases had been granted for 999

(1) *Lloy. & Goo. t. Sugd.* 185. Appendix, No. 18, for the opinion of the Lord Chief Baron.

years, for large fines, with a clause of surrender: The lease had been certified by the Common Pleas in Ireland to be void. The case was afterwards heard in February 1835, before the Lord Chancellor, assisted by the Lord Chief Baron, and the Lord Chief Justice of the Common Pleas. It became, in the view which the Chancellor took, unnecessary to decide the point; but he delivered it as his opinion that the clause of surrender did not vitiate the lease. In an abstract view, and with reference [*336] once to the terms before him, he thought the objection entitled to no weight whatever. It was understood that the Lord Chief Justice was of the same opinion, and the Lord Chief Baron, who was of the same opinion, wrote out the grounds upon which he came to that conclusion. (b) He said, that in a lease of so long a term, and for which so large a fine had been paid, such a clause could have little effect. If the lessee were to surrender, he would lose his large fine. It was objected, that he might exhaust the land, and then surrender his lease. Upon what ground could such a supposition rest? The objections to the clause were these: 1. There is a want of mutuality, the tenant having a right to surrender, and the lessor having no right to revoke. The converse of this existed in *Cardigan v. Montagu*. To this, he thought, it was satisfactorily answered, that there was no such principle of law as that in every contract there must be that mutuality which is contended for here, and that in a lease for every advantage given to the lessee there must be a correlative advantage given to the lessor. In *Cardigan and Montagu* the landlord had a right to revoke. It is said that the landlord is fast, whilst the tenant is loose. Now, in cases under the statute of frauds that often exists, and it is no objection either to a bill for a specific execution of a contract, or to an action at law upon a contract within the statute of frauds, that the contract has been only signed by the defendant, and not by the plaintiff, and therefore not binding on the latter. So in cases not under the statute of frauds, it is no objection that the landlord is bound, and the tenant is loose: and in illustration of this, he cited *Dann v. Spurrier*, 7 Ves. jun., *Price v. Dyer*, 17 Ves., and *Webb v. Dixon*, 9 East. 15. Next it is objected, as a practical inconvenience, that if by

the fall of prices, or other cause, the tenant has a bad bargain,

and cannot pay his rent out of the land, he can throw
[*337] 'the lease up, and the landlord cannot hold him to it.

But it appeared to him (the Chief Baron) a strange cause of complaint that a landlord cannot insist on keeping a tenant who is unable to pay his rent. In Ireland the great difficulty is to get rid of a tenant who cannot pay his rent, and their prædial disturbances and crimes grew out of attempts to do so. Yet this is the objection which Lord Manners threw out in an *extra-judicial* opinion in a case before him. He now came to the ground on which the judgment of the King's Bench, as delivered by Mr. Justice Jebb, rested, and a more extraordinary ground on which a decision could rest that is *to destroy a great part of the leasehold interests in some of the counties in the South of Ireland*, never came within his (the Chief Baron's) knowledge. It was this. The lessee might exhaust the land by repeated cropping, and might then throw it up on the landlord's hands. It was true that it was *possible*, but if that *possibility* avoided a lease for lives, it must avoid every lease where that possibility exists. Now in what case may not the tenant exhaust the land, and leave it so on the landlord's hands? The land may be exhausted completely in ten years, and the *probability* is much greater that a tenant who has only ten years to come, who has no certainty of a renewal, who will be charged a higher rent on a new lease if he has improved the land, and a lower one if he has exhausted it, will adopt the latter, than that one who has a permanent interest for three lives should do so: yet the consequence of the decision in the King's Bench would be, that every lease for ten years would be void. It struck him that the objection was one that could not be sustained. Upon a rehearing, the Chancellor's successor reversed the decree, and set aside the leases, being of opinion that they were invalid. Upon appeal, the House of Lords sent back the case to Ireland, and upon a case directed to the Court of King's
[*338] Bench there, three judges against *one certified that the leases were not warranted by the power.(c) The case is again before the House of Lords.

13. Upon a power to grant building leases, such a lease under

the power expressly exempting the lessee from rebuilding in case of fire, and by another clause enabling him to surrender the lease upon notice, of course could not be sustained. (*d*)

14. We have already seen that a power, general and unlimited as to the extent of the interest to be created, may be controlled by the context; but unless it can be so restrained, that is, by a sound construction of the whole instrument, the donee may exercise the power to its fullest extent. (*e*) In a case in Ireland, a lease for lives, renewable for ever, was settled, with a power to the settlor to lease the lands for any number of years or lives consistent with his interest, at the best rent without taking any fine, and under the power a lease was granted for lives, renewable for ever at a fixed rent: it became unnecessary to decide the point; but the Lord Chancellor said, one consideration was, was this lease made contrary to the power of leasing? Of this he entertained great doubt, so much so that he would not have decided the cause upon that ground until he had first taken the opinion of a court of law upon it. (*f*)

15. And in Mountjoy's case, (*g*) where by a settlement by act of parliament, the parties were restrained from aliening, excepting for life, for jointure, or for the life of any other person, or for years, or at will, according to the custom of the manor, reserving the ancient rent, a lease was granted under the power for 300 years, and no exception was taken to the length of the term.

16. And where by an act of parliament, (*h*) some waste land granted to a vicarage was authorized to be [*339] leased by the vicar for the time being, with the consent of the vestry, for such term or number of years, at and under such rent, reservations or payments as to him and them should seem meet, but the rent to be the highest that could be got without a fine: the preamble of the act stated, that the ground might be let for a considerable yearly rent, if a certain term and interest therein for sufficient number of years, for encouragement to build upon and improve the same, could be granted. In 1719

(*d*) *Stiles v. Cowper*, 3 Atk. 692.

(*e*) *Supra*, vol. 1, p. 522.

(*f*) *O'Brien v. Grierson*, 2 Ball & Beat. 323.

(*g*) 5 Rep. 3. b.

(*h*) *Attorney-general v. Moses*, 2 Madd. 294.

leases were granted by the vicar and vestrymen, of the ground, for terms of 999 years and 1,000 years, at proper but fixed rents. An information and bill were filed to set aside the leases in equity, assuming them to be good in law; but Sir Thomas Plumer dismissed the information and bill. He said that the act gave an unlimited power of leasing, and on the faith of the act the lessees were induced to take the lease. He considered the preamble as controlled by the enacting part. The leases were according to the letter and spirit of the act. It was a legislative power indefinitely to grant a lease, and therefore the leases were valid. No case has been cited where under an unlimited power to lease by act of parliament, a lease has been set aside as too long. *Suppose, by deed, an indefinite power of leasing was given to a tenant for life, could he be prevented from making a long lease? Cujus est dare, ejus est disponere.* And could not, he asked, the Legislature give an indefinite power of leasing?

17. Whether under a power to lease for years or lives, with or without covenants for renewals, leases for 999 years are valid, is a point now before the House of Lords.(i)

18. *As to leases for lives.* A power to grant leases for two or more lives, implies an authority to grant them during [*340] the life of the survivor, although the power is silent in that respect.(k) And it has been decided upon the 13 Eliz. c. 10, that a lease to one for three lives, and to three for their three lives, is the same thing within the intent of the statute which restrains leases *other than for three lives*.(l) The same construction would extend to a private power of leasing, but the lease must be made for lives *in esse*.(m) and the lives must be concurrent; the candles, as the phrase is, must all be burning at the same time, although the power is to demise "for one, two, or three lives," which seems to import succession.(n)

(i) Lord Muskerry v. Chinnery, Lloy. & Geo. temp. Sugd. 185; App. No. 18; Muskerry v. Sheehy, 2 Jebb & Sym. 300; supra, vol. 1, p. 523.

(k) Alsop v. Pine, 3 Keb. 44, pl. 16. See Doe v. Hardwicke, 10 East, 549.

(l) Baugh v. Haynes, Cro. Jac. 76.

(m) Raym. 263.

(n) Doe v. Halcombe, 7 Term Rep. 13.

19. In *Doe v. Halcombe*,^(o) the power was to lease for one, two, or three lives, or for any term of years, determinable upon one, two, or three lives, such parts of the estate as were then demised for any such time, at so much rent as was then paid; and it was held that a lease formerly granted for ninety-nine years, if a son, (an infant,) and any wife of his, and his eldest son, or if no son, his eldest daughter living at his decease, or any of those three, viz., son, wife, and son's son or daughter, should so long live, at the yearly rent of 20s., with a like remainder to another son, was not a lease of the description authorized, and therefore the property demised by it did not fall within the power, for that meant that all the lives should be *in esse*, and named, whereas the lease was not determinable on one, two, or three lives, for when one died, another was to spring up in his room.

20. In *Long v. Rankin*,^(p) where the estate was in Ireland, and the power was to demise for any term or terms of years not exceeding thirty-one years, or for one, two, or three lives, or for any term of years, not exceeding thirty- [341] one years, or number of lives not exceeding three lives; a lease granted for three lives or for the life of the survivor of them, or for the term of thirty-one years, was held to be valid by the House of Lords. Abbott, Chief Justice, in delivering the reasons of the Judges upon this point, observed, that the form of the lease, as regarded the term for which the tenements were to be holden, was unusual, and scarcely known in England, but it was stated to be common in Ireland, and they thought that the language of the power must be understood with reference to the prevailing practice, and the language of the lease was conformable to and warranted by the power; and there was nothing repugnant in itself or contrary to law in such a limitation. Grants or leases for the life of one or more persons and of the survivor of them, and for a term of years to commence at the death of the survivor, were not unknown in England, and their legality had not been questioned; and as to any consequences that might happen to occur by the death of the lessee, or of the persons for whose lives the leases might be made, with a view to the person

(o) *Ubi sup.* See *Right v. Thomas*, 3 Burr. 1441; 1 Blackst. 446; *Smith v. Clark*, 9 Cl. & Fin. 126. *Vide supra*.

(p) Appendix, No. 2, *Hosier v. Powell*, 1 Long. & Town. 2.

in whom the interest might vest by operation of law, there did not appear to be any greater difficulty in one class than in the other.

21. In the case of *Common v. Marshall*, before cited for another purpose, *(q)* where the estate was in Ireland, and the power to lease was for any term not exceeding thirty-one years, or three lives, to commence in possession, a lease for three lives, or for thirty-one years, which should last longest, was held valid, as a lease certain for three lives: *or* was read *and*, and the remainder for thirty-one years was rejected as an excess.

22. And he that has power to make leases for three lives may make leases for two lives; *(r)* that is, as in the case of chattel leases, he may create a less interest, *being of the same nature*, than the power mentions.

(q) 7 Bro. P. C. 111. Vide *supra*, p. 77.

(r) Bridg. by Ban. 91.

*SECTION IV.

[*342]

OF LEASES IN POSSESSION AND IN REVERSION.

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| <p>2. Nature of a lease in reversion, of a lease in futuro, and a lease in remainder.</p> <p>6. Meaning of lease in reversion, where the power is to lease for life.</p> <p>8. Leases in reversion for years; concurrent leases.</p> <p>10. General power authorizes only leases in possession.</p> <p>12. Although the estate is then in lease.</p> <p>17. So if the power is to lease in possession.</p> <p>19. <i>Coventry v. Coventry</i>, with observations.</p> <p>25. Lease in reversion bad, under power to lease for years determinable on lives.</p> <p>26. Where leases in reversion are authorized.</p> <p>27. } Leases in possession and reversion</p> <p>30. } not authorized.</p> <p>31. Power in disjunctive for years or lives, both not authorized.</p> <p>32. Where leases in reversion authorized, repeated leases bad.</p> <p>33. Lease in reversion should be without an interval.</p> <p>34. Power over reversion to lease in possession or reversion.</p> <p>37. <i>Doe v. Lock</i>.</p> | <p>38. Power to lease in possession, lease in futuro, if next day, void.</p> <p>39. } Construction of "from the day of</p> <p>41. } the date," &c.</p> <p>43. Lease valid if not executed until it is to commence.</p> <p>44. Effect of contract for a lease at a future day.</p> <p>45. Lessees from year to year attorning, lease in possession, good.</p> <p>46. Presumption of surrender of prior lease.</p> <p>47. Surrender in law by new lease to the old tenant.</p> <p>48. Right of outgoing tenant to depasture on objection to lease in possession.</p> <p>49. Lease in reversion invalid, although term in power not exceeded altogether.</p> <p>50. Lease in reversion not warranted by former leases, &c.</p> <p>51. Leases may be renewed.</p> <p>53. Covenant for renewal not warranted does not avoid the lease.</p> <p>54. Unless fraudulent.</p> <p>55. Purchaser bound to renew under covenant by tenant for life not warranted.</p> <p>56. }</p> <p>57. } Observations on <i>Taylor v. Stibbert</i>.</p> <p>58. }</p> |
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1. AND first, in all well-drawn powers of leasing, where it is intended that a lease in reversion may be granted, it is expressly declared so; and if a reversionary lease is [*343] not to be granted, it is expressly declared that the lease shall be made to take effect in possession, and not in reversion, or by way of future interest.

2. Lord C. J. Holt has thus explained the nature of a lease in reversion: In the most ample sense, that is said to be a lease *in reversion* which hath its commencement at a future day, and then it is opposed to a lease in possession, for every lease that is not a lease in possession in this sense is said to be a lease in rever-

sion,(s) but the usual construction of the term *lease in reversion* in powers is, a lease to commence after the end of a present interest in being ; which is the second notion of a lease in reversion.

3. The present language of the law agrees with the latter observation : in leases granted under powers, a lease is said to be *in futuro* when it is granted from a day to come and there is no prior lease subsisting, or if there is an existing prior lease, the new lease, is granted not dependent upon it ; so that in this sense a lease *in futuro* may be granted as well of a reversion as a possession : a lease under a power is termed a *lease in reversion* where it is to take effect regularly *after* a prior subsisting interest ; or in other words, a lease *in* reversion in this sense is a lease of the reversion, to take effect not as a concurrent lease, but on the regular determination of the prior interest.

4. A reversion in a proper legal sense implies such an estate to which there is an attendancy of a particular estate upon which it depends and is expectant, as the pleading is ; and yet even the word reversion, *secundum subjectam materiam*, is often taken for *terra reverts*. But an estate *in* reversion hath been in all constructions of deeds taken for an estate *in futuro*, and not a possession,(t) for *in legal acceptance* a lease for years in [*344] reversion and a future interest for years are one and the same :(u) a future lease and a lease in reversion are synonymous.

5. Where a power authorizes a lease in remainder, it means a future interest, which is a remainder in the grammatical construction and in the vulgar acceptance. He that hath a future interest, to commence after an existing interest, hath a remainder ; that is, the land is to remain to him after the particular precedent estate determined. Nay, nothing else can be meant in such a case by a lease in remainder, for a *legal* remainder is that which commences at the same time with the particular estate, which a remainder by virtue of such a power cannot do. And the law also expounds remainder and reversion as one and the same thing in common acceptance.(x)

(s) 1 Com. 38; and see Cart. 14, 15; 2 East, 383.

(t) *Lyn v. Wyn*, Bridg. by Ban. 131.

(u) Per Bridgman, C. J. Cart. 14, 15.

(x) Bridg. by Ban. 99; per Bridgman, C. J.

6. But a lease for life cannot be made to commence at a future day, and for that reason the very same expression, lease *in reversion*, may have a different signification in the same conveyance. Being applied to a lease for life it shall be intended of a concurrent lease, or a lease of the reversion, viz. a lease of that land which is at the same time under a demise, and then it is not to commence after the end of the demise, but hath a present commencement and is concurrent with the prior demise; but being applied to a lease for years, it shall be intended of a lease which shall take effect *after* the expiration or determination of a lease in being.(y)

7. It appears therefore, that where a lease for years only is in existence, an immediate lease for life of the reversion may be granted, if authorized by the power, and that which is a lease of the reversion shall be considered a lease *in reversion* within the power. But as a freehold lease cannot be granted to take effect *in futuro*, if a lease for lives is granted, no [345] further lease for lives can be granted till the first lease determines.(z)

8. But although a lease for lives cannot be made in reversion, that is, as Coke explains it, *in futuro*, yet a lease for years determinable upon lives may.(a) And where the power authorizes it, a chattel lease may be granted pending a prior subsisting one, provided it give no beneficial interest during the continuance of the subsisting lease;(b) and this, in speaking of chattel leases, is what is properly called a *concurrent lease*. Where there is either a lease for lives or a lease for years in being, of course the lessor may grant or demise the reversion so as to entitle the grantee or lessee to the immediate benefit of the existing lease; but this is an operation never within the view of ordinary powers of leasing, the objects of which is to secure the rents for the persons entitled to the reversion under the settlement creating the power, and not to constitute a new lessor.

9. But when it is ascertained what interests may by law be created, we must resort to the language of the particular power to ascertain what interests may by law be created, we must resort

(y) *Winter v. Lovelady*, 1 Com. 36, per Holt, C. J.

(z) 10 East, 184, 185.

(a) *Whitlock's case*, 8 Rep. 70 b.

(b) 10 East, 184.

to the language of the particular power to ascertain what interest it authorizes to be granted.

10. It has been determined, that even a *general* power to lease for a certain number of years, without expressing that the leases shall be in possession, and not in reversion, authorizes leases in possession only, and not in reversion or *in futuro*; for if by the power a reversionary lease might be made, then a lease for the years authorized might be made in possession, and afterwards infinite leases for the same term in reversion, which would be contrary to the meaning of the power, and would render idle and vain the express limitation in the power of the number of years for which the lease might be granted.

11. This was decided in *Lady Sussex v. Wroth*.^(c) [346] where land was assured by the Earl by act of parliament to his wife for her jointure, the reversion in fee to himself, with a power to him to make leases for twenty-one years, rendering the ancient rent, and the Earl made a lease for twenty-one years, and before the end of it made another lease to the former lessee for twenty-one years, bearing date the 30th March, to commence at Michaelmas following, and it was adjudged void as a lease in-reversion; and if he might make a lease to commence at Michaelmas following, he might make it to commence twenty years after. And this is now a settled point. *Bridgman, C. J.*, observed, in a later case,^(d) that a power to make any leases for twenty-one years or three lives, though the words mention not whether such leases shall be in possession or reversion nor restrain the power, yet a lease cannot be made at a day to come. That is the express case of *Leper v. Wroth*.

12. Where the estate is in lease at the time of the settlement, and the power is to lease generally, without saying *in possession*, it was laid down by *Windham and Twisden* that a lease may be made to commence at the end of the lease *in esse*. And the same point was expressly decided in (1) the *Marquis of Northampton's*

^(c) Cro. Eliz. 5; S. C. cited 6 Rep. 33 a; 1 Leo. 35, reported, nom. *Leper v. Wroth*. See *Bridg.* by Ban. 94. 696; Palm. 468, 469; *Shecomb v. Hawkins*, Cro. Jac. 318; 1 Brownl. 118; Yelv. 222, nom. *Shecomb v. Hawkins*.

^(d) *Bridg.* by Ban. 96.

(1) In the 28 Eliz. the case was cited by *Popham*, Attorney-general, who said the lease in reversion was allowed to be a good lease, warranted by the statute; 1 Leo. 36. In the report of the case in 4 Leo. 17 (19 Eliz.), it is stated the case was adjourned. In 3 Leo. 71 (20 Eliz.), it is stated in the report as if it was concluded.

case by Manwoode and Dyer against Mounson. The case was a peculiar one, for the first lease had been granted by the husband and wife before the settlement, (I) which was made by act of Parliament, and the proviso was, that all [347] leases made or to be made by the husband for three lives or one life, or for twenty-one years or less, reserving the accustomed rent, should be good. The lease granted under the power was after eight years of the first lease had expired, for twenty-one years next after the end of the first twenty-one years. The question turned upon the meaning of the act, and as there was no restraint of a lease in reversion in the act, the lease was considered good. The act was singularly framed, and the decision hardly established a general rule. By the marginal note in Dyer, Lord Chief Justice Treby (II) appears to have agreed with Mounson : (e) and in the case of Baynes v. Belson, (f) the Court delivered an extra-judicial opinion that such a lease was void.

13. And in Shocomb v. Hawkins, (g) the estate being in lease for years, (III) a settlement was made of it to the settler for life.

(e) Dyer, 357 a; 2 Ro. Abr. 261, pl. 8; 1 Leo. 33, cited; reported imperfectly in 3 Leo. 71. 4 Leo. 17.

(f) Raym. 247; and see Berry v. Rich, *infra*.

(g) Cro. Jac. 318; 1 Brownl. 148; Yelv. 222, *nom.* Shocomb v. Hawkins.

(I) This is ambiguously stated in 3 & 4 Leo., but the fact is not contradicted; and Dyer's report is corroborated by the citation of the case by Popham, in 1 Leo. 36; and the citation is supported by a MS. in the British Museum, where Clinch, J., is stated to have cited the Marquis's case, who had a power by a statute to make leases; *and there was an old lease in being, not made by him, or by force of the statute*, and he made another, to begin after the end of the former, and it was doubted whether it was a good lease or not, because he had not made any lease before; but if both had been made by force of the statute, all held that the latter had been void; Bridge. by Ban., App. E. 596. 606; and Jones, J., so refers to it, *ib.* 612; but Periam, J. in another case, states the case as if the Marquis had granted both the leases; *ib.* 604, 605; but probably he only intended to refer to the point then ruled if the Marquis had granted both. The report in Leonard does not state both the leases to have been granted under the power; and in Dyer, before whom the cause was tried, and whose accuracy may be relied on, states *expressly*, that the first lease was granted before the creation of the power. Indeed the point cannot be doubted, for Dyer gives the date of the first lease, which was three years previously to the creation of the power.

(II) The Marginal notes in Dyer are understood to have been his production.

(III) This is so stated, and appears to be corroborated by the statement in Brownl. The case is reported not well by Yelverton, as if both the leases were granted after the power; and in Raym. 183, it is said *arguendo* that the record of the case does not warrant Croke's report.

with remainder to her son in tail, with power to himself [*348] to make leases at any time for twenty-one years. *The settler, before the first was expired, made another lease for twenty-one years, to begin after the determination of the former lease, and it was held bad, for it ought to have been a lease in possession, and not an interest to begin *in futuro* or reversion after another estate determined.

14. In *Berry v. White*, (h) Bridgman, C. J., said, speaking of *Lady Sussex and Wroth*, but suppose that at the time of such a general indefinite power created the estate was only an estate in reversion expectant upon another, for years or lives, then, he conceived, the donee might make a lease presently after the power created, though the former lease was in being; for it was a reversion when it was settled, and as a reversion upon such a power he might lease it. But indeed such a lease, though it take effect in point of interest *de futuro*, yet it must be made *to begin presently*, as in the case of a concurrent lease of a bishop; and this, he added, as Justice Jones said in the argument of *Evans v. Ayscough*, was put by Popham to be agreed in the *Marquis of Northampton's case*; *it is implied in the report of Shecomb and Hawkins's case in Cro.*—And although in the case before him there was an existing lease at the time of the settlement and of the execution of the power, yet he treated the case of *Lady Sussex v. Wroth* as an authority applying equally to such a case, if there were no special words: (i) and he relied upon *Shecomb and Hawkins as express in the point: there being a lease for years in being*, (as it was in the case before him,) the reversioner made another lease under the power, to begin after the determination of the former lease, and it was adjudged naught, for it ought to have been a lease in possession. And he said if the power should be construed otherwise, to enable the making of reversionary leases, there might be lease upon lease *in infinitum*, and therefore such indefinite words in powers are by construction of law bounded and limited.

where the party himself doth not bind or restrain them. [*349] they are but as agreements *between the parties, and expounded as other covenants and agreements are. That was the true reason of *Leper and Wroth's case*. A lease for twenty-one years, to begin at Michaelmas next, is not by construction of law pursuant to that power.

(h) *Bridg. by Ban.* 94.

(i) *Bridg. by Ban.* 96.

15. In *Berry v. White*,^(k) A. having made a lease for forty years, at a rent of 26s. 8d., settled the estate itself on himself for life, with remainders in strict settlement, with power to A. and after his decease for the next tenant for life, and the rest respectively, being lawfully seised and lawful tenants of the freehold in possession of the estates by virtue of the limitations to make any lease of any part usually leased theretofore, or then in lease, whereof any of them should be lawfully seised or be lawful tenants of the freehold in possession, unto any person or persons, for *any term or terms of years, or life or lives, so as such estate and term exceed not the twenty-one years, or three lives in possession and remainder, or for any number of years, determinable upon one, two, or three lives at the most, and so as the same was not made dishonourable of waste, and so much rent as was then reserved should be reserved.* B., the next remainder-man for life, (the prior limitations having failed,) in 14 Car. 1, demised the property before leased by A. to a lessee for ninety-nine years, if he should so long live, the term to begin after the death, surrender, forfeiture, or other determination of the estate of the first lessee, at the rent of 26s. 8d., and the lease was held good. Bridgman, C. J., in an elaborate argument, laid it down, 1. That the lessor was not required to be in possession of the land, but in possession of the freehold of the land, relying upon the words of the power, for he held that B. was lawful tenant of the freehold in possession: 2. That the term was not required to commence presently, for it was a general indefinite power (before the so, or *ita quod*.) to make any leases for any term of years or life, *and although in the letter of it it extended "to leases in reversion as well [*350] as in possession,—for it is to make any leases for any term,—yet he must agree if there were no more in the case it would not enable to make leases to begin at a day to come.* But he grounded himself upon the words that followed this indefinite power, “so as such estate and term exceed not twenty-one years, or three lives in possession and remainder,” which was not only a clause of restraint, but also a clause of explanation of the power, which was indefinitely expressed before. The law indeed would have explained, if the party had not done so: but his intention appearing that he meant the power should extend to leases in re-

mainder, so they exceeded not twenty-one years, &c. the law would not make contrary exposition *where the words will bear it as largely as the party explains it.* The power was to make an estate in remainder. And in conclusion, he said that the case was not distinguishable from Whitlock's case.

16. Notwithstanding the elaborate investigation which this case underwent, it may be doubted whether the case was well decided. But the important point is, that the Chief Justice in the strongest manner supported the rule, that a general indefinite power will not authorize a lease in reversion, but that it requires special words for that purpose.

17. Where the power is expressly to lease *in possession*, it would no doubt at this day be held that a lease in reversion could not be granted, although a lease was in being at the time of the settlement, and therefore unless a lease in reversion could be granted the power would be in suspense until the determination of the first lease. This was the subject of great doubt in an early case, where the estate before the settlement was in lease for ninety-nine years, determinable on three lives, and the power in the settlement was to lease for ninety-nine years or three lives in possession, or for two lives in possession and one in reversion, or for one life in possession and two in reversion, and a lease for life

was made during the first term. Keeling, J., inclined [*351] that this lease was within the power: the settlement

being solely of the reversion, a present lease of the reversion is within it. Windham and Twisden held, that the settlement being of a reversion, if the words of the power had been generally to make leases, a lease of the reversion, or a lease in reversion, would have been within it; but the power being expressly to make leases *in possession* this lease in reversion is not within it; and they both observed the particulars of the power to make leases for two lives in possession and one in reversion, or one in possession and two in reversion; so it appears that the scope and intent was to have no estate beyond three lives in being at one time. (l) No judgment was given in the case, as the three judges present did not agree in opinion, (m) although it

(l) Opy v. Thomasius, 1 Lev. 167; Raym. 132; 1 Keb. 778. 910.

(m) 4 Mod. 6; Bridg. by Ban. 613.

is said in the report, in *Siderfin*, that it was admitted the lease was not within the power, the lease not being in possession. (*n*)

18. In the *Marquis of Antrim v. the Duke of Bucks*, (*o*) which arose rather earlier, the estate settled was a reversion after a life, and the power was to make leases for three lives in possession. It was insisted that a lease granted was in possession in relation to the estate of the reversion, although an estate for life was before it. *Bridgman, C. J.*, doubted whether the lease was void on that point, but was clear it was upon another; and *Hale, C. B.*, said both points were worth trial and argument in law.

19. In the modern case of *Coventry and Coventry*, (*p*) leases in reversion, under a general power to demise an estate in lease at the time of the settlement, were sustained after many arguments. The estate had been leased by Lord Coventry and his ancestors for 99 years, if three lives so long lived; and at the time of the settlement they appear all to have been out upon such leases. By the settlement the estates were limited [*352] to Lord Coventry for life, with remainders over in strict settlement, with power for every person actually seised of the freehold to make leases of any part thereof which had been usually letten by lease for lives or years of which he should be so actually seised by virtue of the limitation, for any term not exceeding twenty-one years, or determinable on one, two, or three lives, so as there was reserved the accustomed rent, or more, or as much as could be got for the same, and "so as there be not in any part of the premises so leased at any one time, any more or greater estate or estates than for twenty-one years, or three lives, or for any number of years, determinable on three lives." Under the power, on the dropping of a life, leases for ninety-nine years were granted in reversion after the existing life, determinable on two new lives, so that upon the old leases and the reversionary lease there were not at any one time upon any of the lands demised, more or greater estates than estates for years determinable upon three lives. The Chief Justice on the hearing of the case (*q*) said, there was no doubt but by a general power it must be restrained to leases in possession, yet if there was anything to explain the

(*n*) 1 Sid. 261

(*o*) 1 Cha. Ca. 17; 1 Sid. 101; as if the lease was on this ground bad. *Bridg. by Ban. App. p. 617.*

(*p*) 1 Com. 312.

(*q*) 27 April 1719, MS. Rep. in Linc. Inn Library; and see *Bridg. by Ban. 614.*

intention of the to extend parties to make leases in reversion, it may be extended thereto. Therefore, if there appear lands in lease already, and only a reversion in the person who created the power, any person thereto enabled, who is tenant for life, may make leases of those lands in reversion. But it is a question if the power ought not to be uniform to extend to leases either wholly of lands in possession, or wholly in reversion, where there are lands part in possession and part in reversion. The proviso is, *so as, &c.* It is a question if it will not extend to lands in reversion, for though it is a restrictive clause, yet that is as to the number of years or lives. A lease to commence after the death of tenant for life [created under a power] cannot be warranted by the power, for the lease may determine by effluxion of time, surrender or forfeiture, before the life-estate; so here would be a chasm in this case, and too great difficulty to get over. The Chief Justice said that he had mentioned these matters only as proper to be considered on the next argument. In the course of the argument he observed, that by a general power of leasing it would not be contended that a lease in reversion could be made. After many arguments it was ultimately decided that the leases were duly granted.(I)

20. This does not break in upon the rule. The case was manifestly decided upon the apparent intention that the lives might be filled up as they dropped, and upon the clause, *so as* there be not at any one time any more or greater estates than for twenty-one years or three lives, or for years determinable on three lives: for these words showed that it was not the intent of the power to confine the party that he should make but one lease, for it appears by the words in the plural number that several estates were allowed at the same time, but all were to be determinable on three lives.(r) Several arguments, however, were in that case required to induce the Judges to support the lease. An intention to allow leases in reversion cannot be imputed to a settlor, unless that intent is manifested by expression or plain implication. If the contrary principle were admitted, it might, perhaps, be contended that a remainder-man may, under a general power, grant a reversionary

(r) See the argument, 1 Com. 316.

(I) In the MS. report it is stated that this case "was never determined, as Mr. Phillips tells me." Bridg. by Ban. 615; but there appears to be no reason to doubt that the case was decided.

lease of an estate demised by a prior tenant for life under the same power.

21. Perhaps we should not pass unnoticed the principle extracted by Mr. Powell(s) from the case of *Fox v. Prickwood*, (t) as it would, if established, be a very important *one. [*354] It is this: "If there be a power to make leases *in possession* expressly, which attaches upon an estate, part of which is in possession, and other part thereof in reversion at the creation of the power, the donee of the power may *immediately* make leases *in possession* of the estate in reversion, as well as of that in possession." No such principle, however, was established by that case. The estate was limited to a stranger for a valuable consideration for fifteen years, remainder to the owner for life, with a power to make leases *in possession*. And the only question was, whether he could make leases till *his own estate for life* came into possession by the expiration of the fifteen years, and it was holden that he might. The other question could not arise, for although the estate demised was in lease at the time of the settlement, yet it is expressly stated that that lease had expired before the new one was granted, and the Court considered it clear that a lease in reversion could not be granted.

22. In the case of *Berry v. White*, as we have seen, the power was to lease for any term or lives, so as it exceeded not twenty-one years or three lives, in possession and remainder, or for any number of years, determinable upon one, two, or three lives, which last clause Bridgeman, C. J., said extended only to leases *in possession*. It was very true, he observed, this last was but a tautology, and implied in the former; for he that may make a lease for any term not exceeding twenty-one years or three lives, may make a lease for any number of years, determinable upon one, two or three lives, and therefore that there was put in *ex abundanti cautela*, but takes not away the other power.(u)

23. The learned Editor of *Bridgeman's Judgments*(x) has observed that his (Bridgeman's) statement of *Fox and Prickwood* seems *not* to confirm the opinion expressed in this work, which, it is observed, controverts the conclusion which Mr. Powell

(s) Pow. Pow. 425, 426.

(t) 2 Bulstr. 216; 1 Ro. 12; Cro. Jac. 349; 2 Ro. Abr. 260, pl. 5.

(u) Bridg. by Ban. 102.

(x) Ibid. p. 164.

[*355] had drawn from the same case. This *observation does not appear to be correct, for the Chief Justice expressly states that a *lease for life* was made *before* the settlement, and that *when the lessee for life dies*, by virtue of the power leases may be made, notwithstanding the preceding term of fifteen years, which leases in construction of law should precede that term.

24. If a power of leasing in effect authorises an alienation of the estate—having regard rather to the benefit of the donee than the estate—an immediate lease of the reversion may be authorized(y) under general terms.

25. Where a power was to lease for ninety-nine years, to be determined on the death of one, two, or three lives, a lease for ninety nine years, if A. should so long live, to commence from the deaths of B. and C., was held void, although there was a subsisting lease for years, if B. and C. should so long live.(z) Lord Ellenborough C. J., said that what induced the testator to create a power to lease for ninety-nine years, determinable on three lives, in preference to a power to lease for three lives, we do not know ; it might have been equally beneficial to the tenant for life to have empowered him to lease for three lives, but the testator has not so willed, and his will must be conformed to the power, which says, to demise and let for ninety-nine years, determinable on one, two, or three lives. The term “ demise and let ” imports a present possession ; if the lease cannot be executed *in presenti*, it is hardly capable of the sense belonging to the expression “ to demise and let.” It does not appear that the lease in question was anything more than a grant of an interest to be postponed to a future time. The lessor died before the prior lives dropped, the lease therefore must take effect, if at all, after the donee’s death. The prior term might also, by possibility, be expended before the lives. [*356] and it certainly was not the intention of the deviser *that the tenant for life should have power to postpone the grant of an interest to so distant a period, but only that he should encumber the estate to the extent of a term for ninety-nine years, determinable on three lives.

(y) *Muskerry v. Chinnery*, Lloy. & Goo. temp. Sugd. 185; App. No. 18, *supra*, p. 353; 7 Cl. & Fin. 42; *Muskerry v. Sheehy*, 2 Jebb & Sym. 300.

(z) *Doe v. Hiern*, 5 Mau. & Selw. 40.

26. A power to grant a lease may, by the particular wording of it, authorize a lease in reversion, although not so expressly stated, and the estate is not in lease at the time of the creation of the power: Thus, where the power was to lease for any number of years, not exceeding ninety-nine years *from the time of making the demise*, it was adjudged that the latter words did not refer to the commencement of the lease, but only restrained the making of the lease for more than ninety-nine years from the making; and that a lease might be made for sixty years, to commence twenty years afterwards; for it would not exceed ninety-nine from the time of making the demise; the true construction of the power was, that he might lease for ninety-nine years from the time of making the lease, or for any other term not exceeding ninety-nine years. (a) One of the judges did not agree with this judgment. It probably would not have been so decided at this day. (1)

27. Even where the power authorises leases in possession and reversion not exceeding a limited number of years, yet upon one letting a lease in possession and another in reversion cannot be granted.

*28. Thus in the case of *Doe v. Harvey*, (b) the power [*357] was to demise for any term of years, so as such term did not exceed ninety-nine years from the date of executing such lease; and so as every such lease be made to take effect *either in possession or immediately after the determination of the lease then subsisting thereof respectively*, and so that the best rent were reserved. In May 1787, there were leases subsisting which would expire on the 10th October, 1791. On the 29th May, 1787, a lease was granted under the power for thirty years from the 10th October, 1791, and *at the same time*, under the same contract, another

(a) *Harcourt v. Pole*, 1 And. 273. See 2 Lord Raym. 1000.

(b) 1 Barn. & Cress. 426; and 2 Dow. & Ry. 589.

(1) It is said to have been overlooked in this work, that the case was tried again in the next year in another Court, where a *contrary* judgment was given; *Bridg* by Ban. 619; but the note in *Moore*, 722, which is referred to, does not show the case was heard in another Court, although *Anderson's Rep* is of the 33 Eliz., and *Mo.* cites it as the 34th, which proves but little. The lease was really granted *a die confectionis*, and the power was for any number of years, not exceeding ninety-nine years, *del tempus aet confection*, *de tiel* demise, and the lease was held good, as it was only for sixty years; and *Moore's* note says "power in uses to make leases not exceeding ninety-nine years, *a tempore confectionis*, *a die confectionis*, not good, which is correct, according to *Anderson*, if the whole term had been granted.

lease was granted to the same person for sixty-three years from the day when the lease for thirty years would expire, at a less rent than was reserved by the first lease. The object was to obtain a larger rent for the tenant for life than for the reversioner. The two leases were held to be in substance but one. It was held that the second lease was not a lease to take effect in possession or immediately after the determination of the lease then subsisting, for the only subsisting lease at that time was that which expired on 10th October, 1791. It was said by the Court, that if "the tenant for life might make two successive leases, he might make any other number; he might even make successive leases for every year of the term which the power enabled him to grant. Now that might be very prejudicial to the reversioner; it might even make the clause of re-entry wholly inoperative; for by non-payment of rent, or breach of any of the covenants in the several leases, the lessee would only forfeit the subsisting term granted by the lease then running; and if he was turned out of possession, he might enter again under the next lease: whereas, if there were but one lease, the entire term would be forfeited by any breach of the covenants. Suppose in this case the tenant for life had lived twenty-seven years after the first lease took effect, and then died, and that the tenant of the estate then refused [*358] "to pay the high rent reserved by the first lease, the landlord might re-enter, but at the expiration of three years the tenant would be entitled to have the estate again at the lowest rent reserved by the second lease; but if the clause of re-entry was in one undivided lease, by entering, the owner of the estate would become possessed of it for the entire term. It was not necessary to intimate an opinion whether, if the tenant for life had honestly made a lease for one term, he might subsequently and in consequence of a different bargain, have made another lease for a further term. Here both the leases were made in consequence of one bargain."

29. In the later case of *Shaw v. Summers*, (c) there was a subsisting valid lease for ninety-nine years, determinable with three lives. This lease was transferred to a trustee upon trust to sell and pay off some mortgage-money; and upon trust, until such sale, to let the premises for such time and term, not exceeding

twenty-one years, and determinable as the said term of ninety-nine years was determinable, as the trustee should think proper. In pursuance of the trust or power, the property was let from a day to come for ten years, if the lives should so long continue; and it was held that the lease was not a valid one under the power.

30. Although a power enable a man to make leases in reversion, as well as in possession, yet he cannot make a lease in possession, and another lease in reversion, of the same land, but his power to make leases in reversion shall be confined to such land as was not then in possession. (d) ✓

31. So where the power was to make leases for any term or terms of years, or life or lives, so as such did not exceed twenty-one years or three lives in possession and remainder, or for any term determinable upon three lives; a lease under the power for one life and ten years is not within the power, for the estate must be such as exceeds not three lives or twenty-one years. It is in the disjunctive. Such an estate under the power cannot be good, for the ten years and a life may exceed three lives, or twenty-one years, and if by possibility they may do so, though *in facto* they do not, it will not amend the matter. (e) 3

32. And although the estate being already in lease, the power authorize a lease of the reversion, yet it will not, it seems, authorize repeated leases in reversion, unless the intention appear plainly. (f) *note*

33. And the lease of the reversion should, in the common acceptance, be a lease in reversion; for if there is an interval between the former lease and the lease of the reversion, it may not be good, for such a power intends a remainder or reversion upon that which is precedent. (g) and not a lease *in futuro*.

34. Where a reversion is settled, with a power to lease in possession or reversion, a present lease of the reversion may be granted.

35. This was decided in *Perott v. Cable*, (h) where the power

(d) *Winter v. Loveday*, 1 Com. 36. per Holt.

(e) *Bridg. by Ban.* 99.

(f) *Ibid.* 101, 102.

(g) *Ibid.* 102.

(h) 2 Ro. Abr. 261, pl. 9, per Coke and Winch.

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was to make leases for lives, and for eighty years determinable upon three lives in possession or reversion,(i) reserving the ancient rent. The donee may grant a reversion for eighty years determinable upon three lives, reserving the ancient rent, where there is an estate for life in possession : although the words are *in* reversion, and not *of the* reversion, yet it is good ; for debt lies against the grantee of the reversion for the rent well enough, and so no mischief to those in reversion. It was not doubted that he might have made a lease to begin after the death of the tenant for life : so that he did less than he might have done.

36. In a case where the power required the leases to [*360] be *in* possession and not in reversion, a lease was granted, and then, before the determination of it, another ; and Holt, C. J., at *nisi prius*, is reported to have held, that by the first lease, the power was suspended for the time of the lease, but that being expired, he inclined that the second lease was good.(k) It was not necessary to decide the point, and this opinion cannot be supported.

37. In the case of Doe v. Lock,(l) the power was to lease for ninety-nine years, determinable on one, two or three lives in possession, reversion or remainder of such part or parts of the property as then was, or had been anciently demised for one, two or three lives in possession or reversion, so as there were no more than three lives in being at one time. A lease was granted for ninety-nine years, determinable upon three lives. Another lease was granted *from the death of A., one of the lives in the last lease, or sooner determination of the estate then subsisting and determinable on his death*, for the remainder of the term granted by the former lease, if two other lives, or either of them, should so long live.(m) Upon an ejectment by the remainder-man against the lessee, impeaching, for certain reasons, both of the leases, the Court of King's Bench considered that it was not in strictness necessary to inquire into the validity of the first lease, for the tenant for life, who made that lease, was dead, and he was enabled to grant leases in possession or reversion, and there was an exist-

(i) This is supplied from Godb. 195, and is proved by the context. The case is incorrectly reported in 1 Goulds. 173.

(k) Sands v. Ledger, 2 Lord Raym. 792.

(l) 2 Adol. & Ell. 705.

(m) See page 709, 3d column.

ing life in each lease. The second lease was made to commence on the death of A., or other sooner determination or avoidance of such estate as was subsisting and determinable on his death. The lease did not state whether A., or who else was the existing life under the first lease [but of course it was A., as the reversionary lease for two more lives proved.] If, the Court said, A. were dead, the second lease took effect on his death; if he were still alive, then, inasmuch as the lessors of the [*361] plaintiff disclaimed both of the leases, if the first was not a valid one, it was at all events at an end.

38. Where a lease ought to be granted in possession, a lease *in futuro* is void; (n) and if it be made to commence only a day after the date of the deed creating it, is as fatal a variance from the power as if made to take effect at the expiration of one hundred years from the time; and the rule, as we have seen, is the same in equity as at law. (o)

39. It has long been settled, that a lease to hold "from henceforth," "from the making," "from the time of the delivery of the indentures," or "from the sealing and delivery of the deed," is a lease in possession, and not *in futuro* (p) and it shall begin from the delivery, where no time is mentioned; (q) and "from the date," has in these cases the same meaning, (r) although, certainly, this opinion has not always prevailed. (s)

40. And, nice as the distinction may seem, the words "from the day of the date," were, by a series of decisions prior to the famous case of Pugh and the Duke of Leeds, holden to be exclusive, and to render the demise a lease *in futuro*, and consequently void. Amongst these decisions several modern ones may be ranked, which underwent great consideration; (t) and even two

(n) Pollard v. Greenvil, 1 Cha. Ca. 10; 1 Cha. Rep. 185; Doe v. Calvert, 2 East, 376, *et supra*.

(o) Bowes v. E. L. Water Works, Jacob, 274; vide *supra*.

(p) Clayton's case, 5 Rep. 1; Higham v. Cole, 2 Ro. Abr. 520, pl. 1.

(q) Co. Litt. 46 b.

(r) Osborn v. Rider, Cro. Jac. 135; Hatter v. Ashe, 3 Lev. 438; 1 Lord Raym. 84.

(s) See Clayton's case. 5 Rep. 1; Bacon v. Waller, 1 Ro. 337; 2 Ro. Abr. 520, pl. 4; and see Co. Litt. 46 b.

(t) Denn v. Fearnside, 1 Wils. 176; Attorney-general v. Countess of Portland, Cowp. 723, cited; and see Freeman v. West, 2 Wils. 165.

cases before the very same Judges who decided *Pugh* and the *Duke of Leeds*.(u)

41. In that case, however, after a full review of the authorities, which Lord Mansfield, in delivering the judgment of [362] the Court, declared to be so many contradictions "backwards and forwards, it was decided, that "from the *day* of the date" was the *same* thing as "from the date," and consequently that a lease to hold "from the day of the date," was a valid lease under a power to lease in *possession* only. The principal ground of the decision was, that, "from" might mean either *inclusive* or *exclusive* : that the parties necessarily understood and used it in that sense which made their deed effectual : that courts of justice are to construe the words of parties so as to effectuate their deeds, and not to destroy them, more especially where the words themselves abstractly may admit of either meaning.(x) In a subsequent case before Lord Kenyon, upon the word "from" in an *indictment*, in which the case of *Pugh v. Duke of Leeds* was cited, he said that it was not applicable to the case before him ; and that it must be remembered, that though he believed that case was rightly decided, the contrary determination had before been made by all the Judges. Mr. Justice Ashurst observed, that the case of *Pugh v. Duke of Leeds* was properly decided, but that it turned on the construction of a contract between two persons, where their intention was to be considered.(y)

42. Mr. Powell, in an elaborate argument, which occupies upwards of 100 pages, has shown very successfully that this decision was in direct opposition to the decided cases;(z) but however we may dread the precedent which this case sets for similar innovations, yet, as the mischief to be apprehended from the removal of landmarks must in this instance have already been sustained, it cannot be expected, nor is it to be hoped, that a decision which has so much good sense for its basis will ever be over-ruled. No one, however, would be so rash as to grant a lease to

(u) *Hotley v. Scot*, Lofft, 316; *Doe v. Watson*, Cowp. 189.

(x) *Pugh v. Duke of Leeds*, Cowp. 714.

(y) *Rex v. Inhabitants of Gamlingay*, 3 Term Rep. 513. See *ex parte Fallon*, 5 Term Rep. 283; *Dowling v. Foxall*, 1 Ball & Beatty, 193; *Welch v. Fisher*, 8 Taunt. 338; 2 Moo. 378; *Rex v. Knight*, 7 Barn. & Cres. 413; 1 Mann. & Ry. 217; *Ackland v. Lutley*, 9 Adol. & Ell 894.

(z) Pow. Pow. 433-540.

hold "from the day *of the date" under a power to [363*] grant leases in possession; on the contrary, conveyances *ex abundanti cautela*, always make the *habendum* "from the day next before the day of the date of the deed." (1)

43. It has sometimes happened that a lease, though dated back, and on the face of it appearing to commence *in futuro*, was not in truth executed till at or after the time when it was expressed to commence, and in such case the lease is a valid execution of the power, and may be supported as a lease in possession: for a deed takes effect from its execution, and not from the date of it; and therefore if the time of the execution can be proved, the lease cannot be defeated: (a) and extrinsic evidence is admissible to show when the lease was actually executed. (b)

44. Under a power of leasing, as we have seen, a binding *contract* for a lease may be entered into; (c) and if a *bonâ fide* con-

(a) *Campbell v. Leach*, Ambl. 740; *Doe v. Day*, 10 East, 427. See *Hall v. Cazenove*, 4 East, 477.

(b) *Doe v. Robson*, 15 East, 32.

(c) *Vidè supra*, ch. 10, sect. 2 & 3.

(1) The distinction between the expressions 'the date' and the 'day of the date' when used to describe a period at which an interest is to commence, or time to be computed, has long been a vexed question; and remains so in some measure at this day. The decision of the court in the case of *Pugh v. the Duke of Leeds*, Cowp. R. 714, has by no means left the subject free from doubt. After a very laborious examination of all the cases, I think the following principles may be considered as settled. Where the computation of time is to be made from *an act done*, the day on which the act is performed is included; because *the act* is the terminus a quo the computation is to be made; and there being in contemplation of law no fraction of a day, (unless when an inquiry as to a priority of acts done on the same day becomes necessary.) the terminus is considered as commencing at the first moment of that day. The only exception to this rule which is recollected, is established by the law merchant, which considers the day on which a bill of exchange, made payable at so many days' sight, is accepted, as excluded.

"Where the expressions are 'from the date,' I understand the rule to be, that if a present interest is to commence from the date, the day of the date is included; but if they are used merely to fix a terminus from which to compute time, the day is in all cases excluded. The reason of the rule is perfectly intelligible and sensible. It is that where words of equivocal meaning (which these are admitted to be) are made use of, and there is no index from the *res gestæ* to show the intention of the party who used them, the construction shall be made most advantageous for him in whose favour the instrument is made." Per Washington, J., in *Prierpont v. Graham*, 4 Wash. R. 240, 241: 4 Kent's Com. 952 and notes, 5 ed.; Chitty on Contr. 730. a, Perkin's notes, 5th Ed.; Story on Contr. § 601.

tract be entered into to grant a lease at a future day, it will not be deemed a lease *in futuro* against the remainder-man if the person agreeing to grant it live beyond the time limited for its commencement, although he die before it is actually granted, for every contract must necessarily precede the execution of it. (d)

45. The foregoing cases arose upon leases *in futuro*. In regard to leases *in reversion*, it has been decided, that where the lease is to take effect in possession it will be good, although the estate is in the possession of tenants from year to year, or at will, provided they at the time the lease is granted receive directions to pay their rent to the lessee. This was decided in the case of (*Goodtitle v. Fumecan.* (e)) The lessees at will, and from year to year, in that case, had attorned to the lessee under the power;

and, at the trial before Eyre, Baron, at *Nisi Prius*, [*264] he left it to the jury, *whether the attornment of the occupiers to the defendant, in consequence of the direction given them at the time of making the indenture, did not amount to a surrender by them: and whether they were not to be considered as having become thereby parties to the lease, and as having put the defendant in possession: and the jury were of that opinion and found a general verdict accordingly. A rule for a new trial having been granted, it was insisted against the lease, that the lessor could not have brought an ejectment against the lessees in possession at the time of the demise, and therefore had no immediate possessory right. But to this three answers were given: The first, that the tenants agreed to this lease, and surrendered their possession before the execution of it, in order to make it valid: the second, that if the jury had *not* found the defendant to have been in possession, this would have been good as a concurrent lease: (f) The third, that in respect of the power all the subsisting leases were leases at will. There was no outstanding lease as against the remainder-man; he would not have been bound to give the tenants notice to quit, but might have entered upon them immediately. And upon these grounds the Court were all of opinion against the objection.

(d) *Shannon v. Breadstreet*, Rep. t. *Redesdale*, 52.

(e) *Dougl.* 565.

(f) As to this point, vide *infra*, s. 5.

46. In deciding the foregoing case, the Court did not state upon which of the three grounds their judgment was founded; but the first appears to be the true principle to which it must be referred. And it even seems that an actual lease under the power, if in fact given up at the time of the execution of the new lease, might be presumed to be surrendered in support of the new lease, and at least in a *bona fide* case, where the lessee is in the nature of a purchaser, equity would relieve against the want of a surrender. (g)

47. And of course, if the new lease be made to the person in possession under the old lease, it will, without any actual surrender, operate as a surrender in law of the [*365] old lease, and so no objection on this head will lie to the new lease; and it will have this operation, although the old lease is concealed, and does not appear on the face of the new one. (h) But where the second lease does not pass all the interest which it purports to grant, as if it be void because the best rent was not reserved, there it will not operate as a surrender of the prior term; nor in these cases is it material that the first lease is cancelled; for cancellation at this day will not amount to a surrender in law of a lease. (i)

48. Where a tenancy from year to year has expired, a lease in possession may be duly granted, (k) although the old tenant has a right to depasture the meadow, &c. till a future day. (l)

49. In the case of *Doe v. Lady Cavan*, (m) a lease was in existence under a power of leasing, and a future term was granted under the same power to the person in whom the first lease was vested, and the terms did not exceed together the number of years for which leases were authorized to be granted. It was confidently hoped that the second lease would be considered merely as a continuation of the first. The case, however, was dis-

(g) *Campbell v. Leach*, Anld. 740.

(h) See *Wilson v. Sewell*, 1 Blackst. 617.

(i) *Roe v. Archbishop of York*, 6 East, 86, and the cases there cited; to which add *Wilson v. Sewell*, ubi sup.; *Lowther v. Troy*, Irish T. Rep. 198.

(k) See *Doe v. Calvert*, 2 East, 276.

(l) See *Doe v. Snowden*, 2 Blackst. 1224.

(m) 5 Term Rep. 567, affirmed in Dom. Pro. 1795. See printed case, and 6 Bro. P. C. by Toml. 175. See *Doe v. Harvey*, 1 Barn. & Cress. 426; 2 Dowl. & Ry. 589; *Shaw v. Summers*, 3 Moore, 196.

posed of without argument, as it appeared that the rent reserved was not the rent required by the power : but the Judges appeared to have considered the first objection also as fatal.

50. It is no argument in favour of a lease *in futuro*, or in reversion, under a power to lease only in possession, that the donor of the power himself leased the estate in that way ; or that lands are always so leased according to the custom of the [*366] *country.(n) And although part of the lands are leased in possession, yet if the lease is entire it is wholly void.(o)

51. In no power of leasing in private settlements was there ever any restriction of renewals. Many advantages may result to the estate itself from the power of renewal, and the right to renew will not be restrained without an express intention appears.(p)

52. Therefore, where(q) a power to the master of the Rolls to grant building leases for forty years, provided that after the premises had been once letten, the Master should not grant or make any new or concurrent lease (which were held to be synonymous) *until within seven years of the expiration of the lease then in being*, nor for any longer term than twenty-one years, it was held clearly that a new or concurrent lease might be granted *at any time* during the continuance of a former lease, provided the new lease operated as a surrender of the old one. The argument against the new lease was, that the power being once executed, it determined *pro hac vice*, till the period came round again to make it again exercisable, like the case of a power to jointure, and the new lease was contrary to the words of the power, for the first lease was in being when the second was made, and not within seven years of expiring.

53. Although the lessor, in a lease under a power covenant with the lessee that he will not affect the validity of the lease, for it will bind the lessor only, and if a new lease should be granted, and that should not comply with the terms of the power, it would be void. The power in the case in which this was decided re-

(n) *Doe v. Calvert*, 2 East, 376.

(o) *Ibid.*

(p) *Per Lord Mansfield.*

(q) *Wilson v. Sewell*, 1 Blackst. 617.

quired the best rent.(*r*) It was said that the covenant had a tendency to induce the lessor to run the question on the quantum of rent very closely, for if he renewed at the end of *twenty years from the first granting of the lease, the [*367] remainder-man might have a lease fixed to him for twenty-one years from that time, reserving less than the best rent which could then have been obtained ; but the Court said the answer was, that if the fact was so, the lease would be void.

54. But if the covenant show an intention to act in fraud of the power, equity will not support it.(*s*) But fraud from such a contract should not be lightly inferred, as the renewed lease must to be valid follow the terms of the power.

55. In *Taylor v. Stibbert*,(*t*) under a settlement a father was tenant for life, with remainder over in strict settlement, with the ultimate remainder to himself in fee, with a power to lease for a certain number of lives or years at certain rents, and there was a power to the father and son to appoint new uses for the purpose of sale. The father granted leases under the power, with covenants for renewal on the dropping of any life in the present or any renewed lease. The father and son then sold the estate, and Lord Rosslyn determined that the purchaser was bound to renew the lease to the lessee. The existing leases were excepted in the covenant against incumbrances. Lord Rosslyn held, that the purchaser was bound to grant the renewals. As for the lessor, it was not competent for him to say that he had not a sufficient estate to support the estate he contracted to make. He was bound to procure to the extent of his means : the purchaser was bound to the same extent. It was admitted, that during the life of the lessor, the purchaser could not decline the performance, at least to a certain extent, of the engagement entered into by the lessor. But the lessor would have been compelled to execute a new lease specifying the former covenants in *totidem verbis*, *and not merely to add a life. The great argu- [*368] ment was, that as the leases would have been void as against the son and issue in tail, they could not extend further than

(*r*) *Doe v. Bettison*, 12 East, 305.

(*s*) *Harnett v. Yielding*, 2 Scho. & Lef. 559; vide *supra*, p. 122.

(*t*) 2 Ves. jun. 437. See *Steele v. Mitchell*, 2 Ir. Eq. Rep. 1; 2 Dru. & War. 304; *Clark v. Smith*, 9 Cla. & Fin. 140.

such an interest as the father, the tenant for life, could give under the terms of the power. He admitted the right of the son and the trustees to impeach the leases, but the leases were not void; they were good for the life of the father; and if the intermediate estates should fail in his life, and an estate should be taken after his death under his reversion in fee, they would be good to all purposes. The issue in tail might avoid them, but that consideration could not affect the interest of an estate taken totally out of the settlement. When the parties to the settlement chose to execute the power reserved to the father and son, to appoint new uses of the fee, the settlement, with regard to the estate, was a nullity, it was gone, and the purchaser under that power could not claim anything under the settlement. He stated that this would not interfere with any equity of the persons claiming under the settlement to impeach the sale if the proper price had not been paid for the estate; and he observed that the effect of the exception of the subsisting leases in the covenant against incumbrances, was to protect the person conveying from the consequences of any act to tenants having subsisting leases, which though they might be liable to legal objections, yet would give a title to the lessee to recover upon the covenant for quiet enjoyment against the person from whom he derived.

56. The reasoning in this judgment is not satisfactory. It is considered that the purchaser is bound, because the estate by the execution of the power is taken out of the settlement; but that was a reason why he should not be bound, for as the fee was bought, and was appointed to the purchaser, the estates created by the settlement, including the life-estate, were over-reached, and consequently no act by the tenant for life, attempting contrary to the power to charge the inheritance, could ['369] bind the purchaser when his estate for life was defeated. But the lease, if valid, bound the estate, and the covenant to renew bound the tenant for life; and as the purchaser bought with notice, he ought to have been bound to renew to the extent which the tenant for life, if no sale had been made, could lawfully have renewed by force of his power. The true ground upon which the decree is to be supported is, that as the tenant for life was personally bound by his covenant, and the purchaser bought with notice, and indeed subject to the leases, and took a

sufficient estate to enable him to answer the obligations of the covenant, he was bound to do so in order to prevent the lessee from having recourse to the tenant for life to enforce damages against him for breach of the covenant.^(u) The equity, therefore, was enforced against the purchaser in favour of the tenant for life. His right to this relief might have been affected by his statement to the purchaser, that he was tenant for life, and his son had not concurred, the covenant was of no effect; upon which the conveyance was executed. Lord Redesdale has observed, that he thought the purchaser had a right to say, that having purchased from the son as well as the father, and the covenant not being binding on the son's estate, he should not be bound further than as he purchased an estate which was bound, and that, therefore, notice or no notice was of no consequence to him.^(x)

57. The decision in *Taylor v. Stibbert* has been referred to another ground. It was said, that in order to understand that case it was necessary to observe, that it appears *by the judgment* that the legal estate in fee was in the trustees of the settlement, and therefore the trustees held for all those persons who had equitable interests in the estate; and when the tenant for life with power of leasing contracted with Taylor [*370] to execute his power for valuable consideration, Taylor had an equitable interest which was distinct from the legal interest, and the trustees then held in trust for him as well as for the other parties interested under the settlement. Where land is limited to the several uses to bar dower the equitable estate is merged in the legal, but where the legal estate is vested in a trustee it is distinct from the equitable estate. In *Taylor v. Stibbert*, Lord Rosslyn decided on the ground that the purchaser had notice that the legal estate was outstanding in the trustees of the settlement, and that Taylor had an equitable interest for which they were trustees. As, it was added, it is impossible that a settled estate can be enjoyed except by means of the exercise of a power to lease, the Courts never allow leases granted by the

(u) See *Gray v. Knox*, 5 Ir. Eq. Rep. 465; *Stoughton v. Crosbie*, ib. 451.

(x) See 2 Scho. & Lef. 699, and 2 Sugd. on Purch. 271; the word 'not,' before 'countenance,' is omitted in Lloy. & Geo. t. Sugd. 218.

tenant for life under his power to be defeated by the exercise of a power in the trustees to appoint new uses with the concurrence of the tenant for life.(y)

58. The settlement in *Taylor v. Stibbert* appears to have been by way of use carrying the legal estate to the tenant for life and those in remainder, and not to have vested the fee in the trustees. The passages in the judgment do not appear to show that the fee was limited by the settlement to the trustees. The power of appointing new uses for the purposes of a sale was in the father and son, and they and the trustees sold. The passages in the judgment are these. "The true consequence as to the settlement is this: When the parties to the settlement chose to execute the power reserved to the father and son to appoint new uses of the fee, the settlement with regard to the estate was a nullity—it was gone—and the purchaser under that power cannot claim anything under the settlement. The purchaser takes the legal fee from the trustees *and* by the appointment from the father and son. It moves from them." This may not be very accurate, but it is [371] intelligible. Perhaps the power *authorized the appointment of the fee to the trustees to enable them to convey to the purchaser.

59. But even if the legal fee was by the settlement vested in the trustees, that would not, it is submitted, vary the case, for the tenant for life could not by his covenant to grant a lease bind the equitable estate beyond the limits of his power. Whether he had a legal or an equitable power, the exercise of it would be binding *on the estate* to the same extent, although one would be a legal, and the other an equitable lease. In *Taylor v. Stibbert* the purchaser had direct notice, and the only question was whether so much of the fee as did not belong to the tenant for life should be bound in the hands of the purchaser, by a covenant by the tenant for life not authorized by the power, and which would not have bound the remainder-man if the estate had not been sold.

(y) Per Sir L. Shadwell, Vice-chancellor, 8 Sim. 157, 158.

SECTION V.

OF CONCURRENT LEASES. *fol. 12*

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| 1. Of Bishops' concurrent leases. | 10. Roe v. Prideaux, with observations. |
| 3. Reade and Nashe's case. | 14. Bridgeman's distinction. |
| 4. Fox v. Collyer. | 15. New lease operating as a surrender in law of the old one, valid. |
| 6. Whether the doctrine applies to leases under powers. | 16. New or concurrent leases, where synonymous. |
| 9. Doe v. Calvert, with observations. | |

1. UPON the statute 1 Eliz. c. 19, which restrained bishops from making leases for more than twenty-one years, it has been solemnly decided, that a concurrent lease made to take effect in possession is good.^(z) In the case of Reade v. Nashe, in the 31st of Eliz.,^(a) where an estate was devised in strict settlement, the testator's son being the first tenant for [372] life, with a proviso, that if his son should go about or make any alienations or discontinuance, &c. whereby the premises could not remain as appointed by the will, otherwise than for jointures, for life only, or leases for twenty-one years, whereupon the old rent should be reserved, then that he should forfeit his estate: the son leased for twenty-one years, and then a year before the expiration of the lease he made a new lease for twenty-one years to another person, to begin *in presenti*. And it was argued that although he could not make leases in reversion, yet such a lease as this he might make well enough, for this lease was to begin presently, and so no charge to him in reversion, and the inheritance was not charged in the whole with more than twenty-one years. And Serjeant Newdigate, in arguing the case of Edwards v. Slater, in the 17th of Charles the 2d, vouched a case of Berry and Riche in the Common Pleas, where it adjudged, that if a man has a power to make a lease for years, where there is another lease in being, there, if he make a lease to commence *in presenti* the power is well executed, and the second lease shall

(z) Fox v. Collyer, And. 65, pl. 140; Mo. 107, pl. 251; Bridg. by Ban. 596; Evans v. Ascuith, ib. 610.

(a) 1 Leo. 147.

continue so long as it may, taking effect in possession after the determination of the first lease.(b)

2. In *Berry v. White*.(c) the case above referred to, *Bridgman, C. J.*, was of opinion that where the power was a general one, like that in *Lady Sussex v. Wroth*.(d) and there was a lease in being at the time of the settlement, the donee of the power might grant a present lease of the reversion, but that such a lease must be made *to begin presently*, as in the case of a concurrent lease of a bishop; and he observed that this, as Justice Jones said in the argument of *Evans v. Ayscough*, was put by Popham to be agreed in the Marquis of Northampton's case; it is implied in the report in *Cro. of Shecomb v. Hawkins*.

[*373] 3. One of the arguments we have seen in favour of the lease in *Goodtitle v. Funuean* was, that it was good as a concurrent lease, and for this the case of *Reade and Nashe* was cited. Lord Mansfield in giving judgment said, that *Reade and Nashe* was cited, where under a proviso to grant leases only *for twenty-one years*, a lease had been granted in 4 Ph. & Mar. for twenty-one years, and afterwards, 18 Eliz., a year before the expiration of that lease, another was granted of the same premises for twenty-one years to begin *presently*, and it was held that the second lease was good; the reason given was a strong one, viz. that the inheritance was not charged in the whole with more than twenty-one years. No authority, he said, was cited against this case, nor any answer given to the reasoning in it. The words of the 13th Eliz. c. 10, he added, as strongly required leases to be in possession, and not in reversion, as those in this or any of the common powers to tenants for life; yet in the case of *Fox v. Collyer* all the Judges held that an immediate lease for twenty-one years of premises on which there was a subsisting lease for four years was good. The 18th of Eliz. c. 11, restrained the right to make such concurrent leases to cases where the old lease had not more than three years to run. In a very recent case, decided by Grose, Lawrence, and Le Blanc, J. an *obiter* opinion was delivered, that according to the case of *Goodtitle and Funuean*, a concurrent lease might be granted under a power to lease

(b) *Hard.* 412.

(c) *Bridg.* by *Ban.* 94.

(d) *Supra*, p. 345.

in possession; and the like opinion was delivered in the later case of *Roe v. Prideaux*, when Lord Ellenborough was C. J.; but this opinion was not delivered on two leases *under the power*, but in a case where the first tenancy was not created by force of the power.

4. Thus stand the authorities in favour of concurrent leases. As the doctrine owes its foundation to the case of *Fox and Collyer*, it may be proper to open the other side of the question, with some observation on that case. At the common law the

bishop could not make any lease without 'the confirma- [*374]
tion of his dean and chapter; the stat. of 32 Hen.

8, c. 28, *enabled* bishops, of their own authority, to make leases for twenty-one years, under certain restrictions: but this did not prevent them from granting the possessions of their Sees for any term, with proper confirmation. Elizabeth, upon her accession to the throne, after the sanguinary reign of Mary, found the principalities of the church filled by Roman Catholics. These she resolved to remove, and justly apprehending that they would charge the bishoprics in their own favour, caused the stat. of 1 Eliz. c. 19, to be passed: whereby it was enacted, that any estate made by bishops of hereditaments, parcel of their bishoprics, "other than for the term of twenty-one years, or three lives, from such time as it should begin, and whereupon the old rent should be reserved, &c." should be void. In *Fox and Collyer*, the second lease was duly confirmed by the dean and chapter, for it was not authorized by the 32 Hen. 8. And the only question was, whether it was rendered void by the statute of Eliz., and it was determined that it was not, because it was not either within the letter or the intent of the statute: not within the letter, as was clear by the words: nor the intent, because it was not prejudicial to the successor, inasmuch as he would have two rents: that is, one by estoppel, and the other in interest, where he had but one before, and the intent of the statute is satisfied if there is no longer estate against the successor than twenty-one years or three lives.

5. This case, however, was decided against the opinion of Lord C. J. Dyer, and Mead, J. and also of Plowden, and has not been received as a satisfactory decision, although under the authority of it bishops at this day constantly grant concurrent leases, with

the proper confirmation, and it is too late now to question it. Mr. Justice Hutton, in the 1st of Chas. 1, treated the case as ill decided: he said it was a resolution according to the very words,

but without question, against the very intent of the [*375] maker. (e) And Holborn, in his argument in Evans and Ayscough in the 22d of Jac. 1, (f) well observed, that the 18th Eliz. c. 11, was a parliamentary judgment against the decision. And in the same case, (g) Mr. Justice Doddridge observed, that a concurrent lease was very mischievous, and that the case of Fox and Collyer was only carried by one or two voices of the Judges. (I) But Whitlock, J. thought that not a reason to dispute it: and Jones, J. agreed with him: and Whitlock seemed to think that the same decision ought to be made if the point were *res nova*: and in the case of Threadneedle and Lincham, (h) Ellis, Justice, thought the opinion of Mr. Justice Hutton was not to be put in balance with the resolution of the Judges in Fox and Collyer. Wyndham, J., however, seemed to think that the statute intended leases in interest only: and Lord C. J. Vaughan said that the Judges had made a great strain upon the statute in Fox and Collyer, and he treated a concurrent lease as not within the letter or the intent of the statute, because the statute intended, when a lease was once made, that on the expiration of it the advantage should be to that bishop in whose time it expired, and by this means there will, he added, be always a concurrent lease in being, and the successor can never make an entire lease: and though in pleading men be estopped to say the party that made the latter lease had no power, yet this being found by verdict, the Judges might judge according to truth: also the executors of the lessee are not bound by this estoppel, while the other lease, first made, lasts, and if so, this lease is not for the successor's advantage, and so only good to some purposes, viz. pleading: and in Sheppard's Touchstone it is said, but no case is referred [*376] to, that in the case of a power to make leases for twenty-one years, if the party make more leases for twenty-one

(e) Bishop of Chester v. Freeman, Ley, 78.

(f) Latch. 233; Palm. 457.

(g) Palm. 464.

(h) 3 Keb. 372.

(I) This seems to have been admitted by all the Judges; but see the report in Moer.

years, at more times than one, they are all void but the first : because it is against the intention of the parties, though it be not against the words. (i) And the 2 Jac. c. 3, recites that by the laws and statutes of this realm, no bishop can make any estate whatsoever other than for term of twenty-one years or three lives, with such reservation of rent, and in such manner and form, as by the laws and statutes are provided. It says, for the *term* of twenty-one years, not for the terms, or two terms of twenty-one years. (k)

6. By this time it will be admitted that Fox and Collyer is not a case to rule others by analogy merely ; and if any doubt arises on the doctrine in that case, as applied to the statute of Elizabeth, how much more forcibly must it arise when applied to leases under private powers ? In that case, until the statute, the bishop *pro tempore* might have aliened the land absolutely, with the proper confirmation, and still the concurrent lease is not valid without such confirmation. This, therefore, is a case in which the Judges may have been tempted to restrain a severe *disabling* statute ; and they may have considered that the successor was only bound by a term of twenty-one years at most, upon which he was entitled to the old rent, whereas before the statute he might have succeeded to the land encumbered with a lease for two thousand years at a pepper-corn rent. But how widely different is the usual power of leasing : It is an *enabling* power to a man who could not, of his own authority, make a lease binding on the estate for a single month : and where it requires, as it commonly does, that the lease should take effect in possession, that clearly means not merely a term to commence *in presenti*, but also a term to commence in interest ; the object of such a power is rather the benefit of *the estate* than of the particular [*377] tenant for life in possession ; whereas in cases not expressly prohibited, the Legislature intended to leave bishops in possession of their former rights. In the statute of Elizabeth the lease is not required to take effect in possession : and Whitlock, who we have seen thought Fox and Collyer well decided, expressly distinguished it from a particular power of leasing. The argument

(i) Shep. Touch. 269. If this book was, as it is generally supposed, written by Doddridge, the above passage shows that he continued of the opinion he expressed in *Evans v. Ayscough*, vide *supra*.

(k) See Bridge. by Ban. 140, where it is cited as to reversionary leases.

of Mr. Justice Yates, in *Wilson v. Sewell*,^(l) is still more to our purpose; he said that a lease *in being* is only that *in possession*; *a concurrent lease is not a lease in esse*. It operates only by estoppel. It passes no interest during the former lease. The 18th Eliz. meant to restrain leases in reversion, therefore by lease “in being” the Legislature meant a lease *in possession*.

7. The frame of the act also is important, as it distinguishes the case from a common power to lease for any term not exceeding a certain number of years in possession. Jones, J. observed, in *Evans v. Ascuith*,^(m) that in Lord Sussex’s case a difference is taken between a private power given to a tenant for life which he had not at the common law, which shall be strictly construed, but there it took away the power of the bishop, wherefore the act should be construed largely; and in *Lyn v. Wyn*,⁽ⁿ⁾ Bridgman, C. J., relied upon the same distinction.^(o)

8. The advantage to be derived from the two rents, which was relied on in Fox and Collyer’s case, is no other than a fruitful field of litigation. If the second lessee should enter and be ousted, as of course he would be, the rent on the second lease would, it should seem, be suspended. Or it may be thought that, as at this day leases are made by deed, the second lease would take effect by estoppel as a lease in possession, and attornment being now unnecessary, would carry with it the right to the rent reserved by the first lease, and then the remainder-man’s remedy for his rent would be more complicated and less effect- [*378]
tual than it would have been under a single lease.^(p)

And if it should be established that a concurrent lease is valid, it will of necessity follow, that any indefinite number of concurrent leases may be granted of the same land, a doctrine fraught with too much inconvenience to be established on light grounds. It should seem, then, 1st, That whatever may be the authority of the case of Fox and Collyer, it cannot be considered as ruling private powers; and 2ndly, That a concurrent lease cannot be granted within the true spirit and meaning of such powers. As to the

(l) Blackst. 126.

(m) Bridg. by Ban. 611.

(n) Bridg. by Ban. 122.

(o) Ibid. 138.

(p) See Bridg. by Ban. 136.

authorities in favour of the contrary doctrine, we may first ease the point of Berry and Riche,(I) cited by Serjeant Newdigate ;(q) for the case is now reported, and it depended, as we have seen, on the special power, and the lease was *not* a concurrent one, but in reversion to commence after the lease in being at the time the power was created. Read and Nashe was not decided upon this point, for after the first lease was granted a fine was levied, and it was determined that it was a forfeiture by the tenant for life, and therefore the second lease was void.(r) The point, therefore, did not arise, and we have merely Coke's argument at the bar, who produced no other authority than Fox and Collyer. Besides, the frame of the restriction—which gave the power by implication—altogether differed from the usual power of leasing. Lord Mansfield, in *Goodtitle v. Fumcan*, appears to have given but little consideration to this point, probably because it was not necessary to the decision of the case. He referred to the 13 Eliz. c. 10, whereas the question in *Fox v. Collyer* depended upon the 1 Eliz. c. 19, and the 18th Eliz. c. 11, to which he referred, did not affect the 1 Eliz. c. 19, and it is *altogether [*379] erroneous to say that the act upon which Fox and Collyer depended as strongly requires leases to be in possession, and not in reversion, as those in the case before him, or any of the common powers to tenant for life. The 1 Eliz. restrains bishops from making leases other than for the term of twenty-one years, or three lives, from such time as any grant or assurance shall begin. These *words* therefore, do not at all restrain leases in reversion, although by construction they have been held to do so, and yet to authorize concurrent leases.(s) But the 13 Eliz., to which Lord Mansfield referred, did *not* restrain leases in reversion, which was remedied by the 18 Eliz. Now upon the case before him the *words* admitted of no doubt: they differed *toto cælo* from the acts referred to. The tenants for life were empowered, when they should come and be *in the actual possession* of the estate under the limitations, to demise them to any person *in pos-*

(q) Vide *supra*, p. 372.

(r) *Bridg. by Ban.* 610. The statement of the editor at the top of p. 607, appears to be erroneous.

(s) See *Bridg. by Ban.* 136.

(I) This also is the case incorrectly cited in 1 *Keb.* 911.

session, but not by way of reversion or future interest for twenty-one years, &c., so as upon any such lease there was reserved, to be incident and go along with the immediate reversion, so much rent, &c. Now here, 1. The leases are to be in possession; 2. Leases *by way of reversion or future interest* are expressly prohibited; 3. The rent is to go along with the immediate reversion. It is quite clear that nothing is warranted by such a power, but a lease really in possession, upon which a rent actually and regularly payable is reserved. But, as we have seen, a concurrent lease is not a lease *in esse*. When the lessor hath made a lease, he hath nothing but in reversion during that time, and hath not authority to contract for the possession, for the lessee has the land and the possession, and therefore during the continuance of the lease his contract for any part of the term is a void contract in law and in fact, but only good by estoppel between the parties [*380] and those that come under the estoppel.(s) It *would be difficult upon principle to maintain such a lease at all *under a power*. In the case of a bishop's concurrent lease, with confirmation, the common-law rights are not restrained. Lord Mansfield cited Read and Nash as a case where under a proviso to grant leases *only for twenty-one years*, the two leases were granted, and it was held the second lease was void. But the provision, as we have seen, was in peculiar terms, and according to what was then known the case had not been decided, and now that it appears that it was decided, it turns out to have been upon a question which rendered it impossible to decide the point in discussion. Lord Mansfield added, that no authority was cited against this case, nor any answer given to the reasoning in it.

9. In Doe v. Calvert,(t) in a devise in strict settlement the power was to the tenants for life, as they should be in actual possession of the estates or entitled to the rents thereof, to lease to any person for any number of years not exceeding twelve years in possession, and not in remainder, reversion or expectancy, so as there were reserved upon every such lease during the continuance thereof the best rent that could be obtained, and that in every such lease there were contained a clause of re-entry for non-payment of the rent. A lease was granted under the power

(s) Plowd. 432; Bridg. by Ban. 130, 131.

(t) 2 East, 376.

from different periods, some at a day to come (with reference to the custom of the country) for twelve years, and the lessee was in possession as tenant from year to year, and which tenancy would determine at the periods the lease was to begin. Grose, J., in delivering the opinion of the Court, said that the lease as a lease in reversion was void; but, he said, at all events a concurrent lease might have been granted, according to the case of *Goodtitle v. Fumecan*, for twelve years immediately commencing, *habendum* from a time past: which would have fallen within the terms of the power, which was to demise or lease for any term of years not *exceeding twelve years in pos- [*381] session and not in reversion, for such lease would have been in possession and not in reversion, remainder or expectancy, and would have been for a term not exceeding twelve years, which is the restriction mentioned in the power. Now this was an extra-judicial opinion, resting for its authority altogether on Lord Mansfield's opinion, the discrepancies in which were not detected: nor were the difficulties in the case itself grappled with, for although some of the words are less strong than those in *Goodtitle v. Fumecan*, yet the question whether the lease would have been *such a lease in possession* as the power contemplated was not discussed: the term would have been a present term, but the lease would have been *in esse*, and the land was already in the possession of a tenant. Considered as a concurrent lease, would the rent have been payable within the meaning of the power, and could the power of re-entry have been effectually exercised? The case put appears not to have been well considered; for as the intended lessee was already in possession, a lease in possession for twelve years might have been granted without having recourse to the doctrine of concurrent leases: such a lease would have operated as a surrender of the existing tenancy, and would have been valid. Indeed the very terms of the power seem to have contemplated such leases.

10. In a later case, (u) in which the Court were desirous to distinguish between the effect of a power to lease for life, and a power to lease for years determinable upon lives, the power was held to be in the alternative to grant either a chattel lease not to

(u) *Roe v. Prideaux*, 10 East, 184.

exceed twenty-one years, or a freehold lease not to exceed three lives, and the Court were of opinion that the same premises could not at any one time be under leases for both years and lives. If this were so, it was said, it might make an essential difference to the reversioner or remainder-man, whether the premises were let for three lives or for ninety-nine years determinable [382] upon three lives. *A chattel interest might be granted pending a prior subsisting one, provided it was within the limits of the power, and provided it gave no beneficial interest during the continuance of the subsisting lease; but so long as there was a freehold lease *in esse* a second freehold lease could not be granted. The right of granting a second chattel lease was settled in *Read v. Nash*, and was recognized as law in *Goodtitle v. Funucan*. If a lease therefore was granted for lives, *no further lease* could be granted till that lease was determined; whereas if there were a chattel lease for ninety-nine years, determinable upon three lives, and one of those lives were to drop, a second chattel lease for a new life, in addition to the other two, might be granted during the continuance of the first. Whenever a life therefore dropped, there would be this essential difference between a freehold and a chattel lease, that upon the former no new life could be added, unless the termor would surrender the first lease; whereas upon the latter a new life might be added without any such surrender. In the one case, therefore, an important advantage would accrue to the reversioner or remainder-man if the tenant for life and the person entitled to the first lease could not agree upon a surrender; in the latter, such advantage would be wholly lost.

11. The power in *Roe v. Prideaux* was more favourable in words to the granting of a concurrent lease than the others; but the Court avoided deciding whether it authorized a lease *in futuro*. The opinion of the Court was altogether extra-judicial, and not grounded upon the particular terms of the power. Now we have seen that the right of granting a second chattel lease was *not* settled in *Read v. Nash*, and *Goodtitle* and *Funucan* once more passed without comment. The observation of the Court, that the second lease was good, "provided it give no beneficial interest during the continuance of the existing lease," was well calculated to try the rule.

12. Where the best rent is required by the power, if a *concurrent lease is granted, and the value has risen [*383] since the first lease, it would at all events be necessary to reserve the best, and therefore a larger rent; and so if the value had fallen in the interim a less rent might be reserved. The reservation of two different rents for the same period, particularly as the larger one in the first case could not be recovered in the way contemplated by the power, if at all, during the continuance of the first lease, would clearly show that such a lease could not be sustained as a due execution of the usual power of leasing.

13. Upon the whole, then, the point has never been decided, and is not surrounded by much authority; and there seems reason to suppose that if it should ever be argued on its true principles the decision will be that a concurrent lease cannot be granted. To guard against the contrary determination, it might be advisable in powers of leasing to expressly declare that a concurrent lease shall not be granted. The common power would then run thus: for so many years in possession, and not by way of reversion, or future *or concurrent* interest.

14. It remains to notice the distinction taken by Bridgman, C. J., in *Berry v. White*.(v) It is, that where the power is a *general indefinite* one, like that in *Lady Sussex v. Wroth*,(x) that is, a power to make leases for twenty-one years indefinitely, without a restraint to make them in possession, and there is a lease in being at the time of the settlement, the donee of the power may grant a present lease of the reversion, but that such lease must be made to begin presently, as in the case of a concurrent lease of a bishop; and he observed, that this, as Justice Jones said, in the argument of *Evans v. Ayscough*, was put by Popham to be agreed in the Marquis of Northampton's case: it is implied in the report in Croke of *Shecomb and Hawkins*. Now this opinion contradicts all the observations in the modern cases, where the lease is to be in possession, &c.; and it is apprehended *that it cannot be supported. Popham [*384] does not appear to have put this case as agreed in Lord

(v) Bridg. by Ban. 94.

(x) *Supra*, p. 345.

Northampton's case,(y) and it does not seem to be implied by the report in Croke. Such a power does not authorize a lease in reversion, or of the reversion, although there is a lease in being. It therefore operates as a power requiring the leases to be in possession. Now if such a power does not authorize a concurrent lease, which Bridgman held, how can a power which is only equal to it authorize such a lease? If there is any difference in the words, it must be with reference to reversionary leases. The modern opinions turned upon the import of the usual power of leasing, and not upon the distinction taken by Bridgman.

15. But although the concurrent lease cannot be made, yet a surrender may be taken of the old lease, and a new one granted. If the new lease be made to the old tenant, an express surrender is of course unnecessary; and it is no objection that the tenant for life obtains an increased rent; of course the lease would be void if the increased was not the proper rent.

16. In *Wilson v. Sewell*, as we have seen, the limited restraint against granting new or concurrent leases was held to mean the same thing, that is, concurrent only; and yet it was agreed that the clause could not be read *new and concurrent*, so as to enable the grant of a new lease, not being a concurrent one.(z)

(y) Vide *Supra*, p. 346.

(z) 1 Blackst. 671.

*SECTION VI.

[*385]

OF THE RENT TO BE RESERVED.

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| 1. Rent under a power of leasing a proper rent. | 31. Half yearly payments valid. |
| 3. Where best rent required, improvements cannot be allowed for. | 33. Reservation before the day where valid: after the day bad. |
| 5. If fine taken, lease void, but money may be expended on improvements. | 34. Doe v. Wilson: reservation before first half year. |
| 7. Doe v. Rogers, with observations. | 35. Doe v. Moore: reservation upon improper half-yearly days. |
| 8. If fine be taken contrary to prohibition, lease void, though the best rent is reserved. | 36. Doe v. Rutland: reservation of last half year before the day valid. |
| 9. Fraud not necessary to relief. | 39. Lease of part at a rent pro rata, valid. |
| 10. Price v. Assheton. | 40. Reservation out of old estate and new buildings, valid. |
| 11. What power authorizes a fine in original leases. | 41. Doe v. Lock, reservation of rent out of portions of trees not before demised, bad under power requiring ancient rent. |
| 12. Rejected offers of higher rents not conclusive. | 42. Observations thereon. |
| 13. Criterion of the best rent. | 44. General reservation which may be rendered certain, valid. |
| 14. } Bad if the best rent is not reserved for the whole term. | 45. } Orby v. Mohun. |
| 15. } | 46. } |
| 16. New lease upon surrender of old at an increased rent, valid. | 47. } Several demises in one deed. |
| 17. Best rent in building leases, &c. | 48. How v. Whitfield, with observations. |
| 18. Bad covenant for renewal upon the same rents does not avoid the lease. | 51. Where a lease of opened mines is good, though joined with unopened mines not within the power. |
| 19. Rent must be the best when lease commences. | 53. Reservation of one rent for an estate, part of which is not in the power. |
| 20. Authority to deduct repairs not done by landlord, if best rent still left, valid. | 56. } Whether in such case there can be apportionment. |
| 21. What is the ancient rent. | 61. Doe v. Rendle, with observations. |
| 22. Where omission of covenants is a fraud on the power. | 64. Rules established. |
| 24. Usual or most rent. | 65. Lease at one rent of an estate, one moiety of which is held under a power. |
| 25. Rent includes produce of a mine. | 67. Reservation to lessor, his heirs and assigns, &c. valid. |
| 27. Where from extent of property best rent cannot be known, lease bad. | 68. Although lessor not the settlor. |
| 28. Rent for time past valid, but must run for the whole term. | 70. Like as to heriots, &c. |
| 29. Reservation of ancient rents, &c. must be as before. | 73. Where no rent needs be reserved. |
| 30. Quarterly reservation instead of half yearly under power requiring ancient rent, &c. | 74. Apportionment of rent under 4 Will. 4. c. 22. |

1. A RENT, properly so called, may be reserved upon a lease derived out of a power, notwithstanding Coke's opinion
 *in Chudleigh's case to the contrary, which was no part [*386]

of the judgment in that case, nor mentioned by him to be elsewhere adjudged. It was said in favour of the render, being a proper rent, that as the lease itself by force of the power would in judgment of law precede the lessor's estate, surely the reservation might also precede it, and ought to be valid.(a) The rent reserved may therefore be distrained for by every one in his turn as they happen to be entitled immediately upon the lease.(b)

2. The questions in regard to *rent* generally arise either upon the *quantum*, or the mode of reservation. Where a settled estate has been usually let on lives, the common power of leasing is upon fines, which, as the lives or leases drop, are considered among the annual profits.(c) This is generally the case in Ireland, but it prevails only in a few counties in England. The power of leasing commonly introduced into settlements of estates in England, requires the best rent to be reserved, and expressly prohibits the taking of a fine.

3. Whether the best rent *is* reserved, is a point to be decided by a Jury. It is clear, that under a power to lease at rack-rent, improvements by the tenant, however valuable, will not authorize a lease at an undervalue,(d) although if a prior valid lease, under which the money was expended, has not expired by effluxion of time, but has been surrendered in law by the acceptance of a new lease, Lord Kenyon thought that equity might give relief.(e)

4. A power was to lease at the best and most improved rent that can be reasonably had or obtained. Lord Redesdale asked, Does that word reasonably, really and truly, though perhaps introduced from caution into it, vary the instrument the [*387] least in the world? Would it not be a sufficient execution of the power if the best and most improved rent had been obtained according to reasonable estimation of the best and most improved rent? But he should consider from that, although the rent reserved may not be the very best rent that could be got, yet if it was fairly and honestly and reasonably the best that could be reserved, without any fine derived by the person who granted it, that it was a good lease: the word reasonable

(a) T. Jo. 35.

(b) Harcourt v. Pole, 1 And. 273.

(c) See 1 Burr. 121.

(d) Roe v. Archbishop of York, 6 East, 86; and see Doe v. Lloyd, 3 Esp. Rep. 78.

(e) Doe v. Lloyd, ubi sup.

was a word merely of caution, and would not alter in any degree whatever the construction of the power.(f)

5. If a fine be taken contrary to the prohibition, the lease cannot be supported, not only because it is against the intent of the power, but because it is evident, that *however considerable the rent*, it might have been increased if the fine had not been taken. In a case before Lord Redesdale, the tenant covenanted to lay out 200*l.* in improvements: and it was argued that this was equivalent to a fine, but he said, that he thought this would not avoid the contract if the rent were, notwithstanding, the best that could be got. Such a covenant, he added, is not necessarily a fraud. It may be made with a fraudulent intent, and when it is so made it will avoid the lease; if it were colourable, and merely for the purpose of putting money into the pocket of the tenant for life, it would avoid the lease; or if it were not originally intended as a fraud, but were afterwards used fraudulently (as for example, a covenant to repair, and a sum of money under colour of damages for breach of that covenant recovered by the tenant for life.) a court of equity would at least take care that the damages should be laid out on the lands.(g)

6. We should, however, be cautious in the application of the principle of this decision to cases in practice. It should seem, that although the rent reserved be the full value [388] of the land, yet if satisfactory evidence could be produced to a jury that a tenant was willing to give an additional rent in lieu of the money agreed to be laid out in improvements, the lease could not be supported. It would not be the *best rent* that could have been obtained. In these cases it is not necessary that there should be fraud and collusion between the lessee and tenant for life. The simple question is—Is the rent the best rent? If it be not, the lease must fall to the ground, however fair the transaction.(h) But an expenditure on improvements is not like a fine paid. A man may be willing to give the best rent, and yet improve the estate; but if he were willing to give the rack-rent and

(f) 2 Brod. & Bing. 614.

(g) Shannon v. Bradstreet, 1 Rep. t. Redesdale, 52; and see Campbell v. Leach, Ambler 740; Doe v. Bettison, 12 East, 305; Cox v. Day, 13 East, 122; O'Brien v. Grierson, 2 Ball & Beat. 323.

(h) See Wright v. Smith, 5 Esp. Rep. 208. See 5 Dow, 344.

a fine besides, he would no doubt increase the rent if the fine were remitted.

7. In *Doe v. Rogers*, (i) the settlement contained a power to Eliz. Rogers to lease for any term not exceeding ten years from the date thereof, or seven years from the decease of Eliz. Rogers, to take effect in possession, so as there should be reserved the best rent that could be gotten for the same, without taking any premium for the making thereof. Elizabeth, in exercise of the power, granted a lease for seven years, to be computed from her decease, at the yearly rent of 150*l*. The lessee covenanted to allow three younger children of the lessor to reside and board with him upon the premises at 7*l*. per annum each, and to suffer one of her sons to reside with him upon the premises, and at his (the lessee's) sole expense provide him with board and clothing without being paid for the same. The lessee was a child of the lessor's; all the children were above twenty-one. The case was tried before Taunton, J., who held that the covenants were in the nature of a pre-

mium taken by the lessor, and that taking of any pre-
 [*389] mium whatever made the lease absolutely void; and that as it appeared upon the face of the lease a premium had been taken, parol evidence was inadmissible to show that before the lease was granted the land had been valued by a person of competent skill, without any reference to the covenants by the lessee to maintain the lessor's children. Upon a motion for a new trial, Park, J., and Patteson, J., held that the ruling was wrong. They considered that unless the Court could pronounce that it was *impossible* that the lease could be a valid execution of the power *under any circumstances*, the defendant was entitled to have his parol evidence submitted to a jury. As to the fine or premium, in the ordinary acceptance of those terms, none was paid or taken; and if benefit to the tenant for life be equivalent to a fine or premium, none appears: for it did not necessarily follow that the covenants to support the children were beneficial to the mother, the tenant for life, as all the children were grown up and bound to maintain themselves, and after the death of the lessor she could not be bound to maintain them. Besides, so far as relates to the daughters, it was impossible for the Court to say that the contract

(i) 5 Barn. & Adol. 755; 2 Nev. & Man. 550. See *Clark v. Smith*, 9 Cl. & Fin. 126.

was *necessarily* beneficial to the lessor, if she was bound to support them, for it *might* be beneficial to the lessee; and so far as relates to the son, it was possible that there may have been some collateral consideration for it, as for instance, a bequest of the personal estate of the lessor to the son, the lessee. As to the amount of the rent, that was generally a question for the jury. Did the existence of the above-mentioned covenants make it no longer so? Were they so clear a proof that the lessee would have paid more, and consequently that this rent was not the best, that no evidence could ever prove the contrary? They conceived that they were not *conclusive* of this question, and though it was highly probable a jury would think that the best rent was not reserved, it was certainly *possible* that such evidence might be adduced as to prove it was; and they relied on the case of *Shannon v. Bradstreet* as a distinct authority on this part of the case. Mr. Justice Taunton retained his original opinion, which appears to be the correct one. It should be borne in mind that the lease was not to commence till the lessor's death. Now, if a parent will stipulate for the maintenance of his offspring, that must be deemed money's worth. It is immaterial whether he was bound to maintain them or not. It cannot be doubted that it is an additional annual payment by the lessee. The lessee was to board and lodge one child free of expense, and this payment was to be made to a third person by the direction of the tenant for life, over which the reversioner had no control. Suppose the lessee had simply engaged to render to the son so much corn, &c. the produce of the farm, in addition to the rent? The covenants therefore were, it should seem, equivalent to a premium on the face of the lease. Was parol evidence admissible to explain this, that is, to show that the covenants were founded upon a different consideration? It appears to be dangerous to open the door to such evidence, for no such consideration appeared on the face of the deed; and if a tenant for life is allowed to mix up collateral considerations with the consideration for the lease without making any mention of them, and they are afterwards permitted to be proved by parol evidence, the *reversioner* can never be certain upon what grounds the leases stand by which he is to be charged.

8. In the last case the judges discussed the question, whether the power absolutely prohibited the taking of a fine. The two

learned Judges who agreed *assumed*, in order to try the question before them, that the power required two conditions: first, that there should be the best rent; and secondly, that there should be no fine or premium; and that they observed was to put the case the most strongly against the defendant. Mr. Justice Taunton said, that the question was not simply whether the best rent that could be got was obtained, but also whether the lease [391] was granted on a premium. The condition in the power was twofold; first, that the best rent should be reserved; and secondly, without a fine or premium. That implies that no fine or premium shall be taken. The evidence offered was to show that in fact the best rent had been reserved. Assuming that to be so, still if a premium was taken there was a breach of the condition in the leasing power. One reason for the condition in these powers, that no premium shall be taken, was, he imagined, to provide against the uncertainty of parol evidence in the doubtful question, what was the best rent that could be got when the lease was granted, which in the case of old leases may be at a very distant period. If any premium whatever was taken, that seemed to him a breach of the condition in the power. A power to lease should be construed strictly and rigorously, because it was a power to be exercised over property which, upon the death of the donee, belongs to another. With the latter observations the writer does not concur. It does not appear to be the true rule, but the prior observations appear to be correct; you are to reserve the best rent which can be obtained, without taking a fine—that interdicts you from taking a fine. No one doubts that 100*l.* paid by a lessee to a lessor exercising such a power would avoid the lease, although a cloud of witnesses should prove that the rent reserved was the best that could be obtained. In a case like that before Lord Redesdale, the expenditure is not considered in the light of a premium; but the lessee although he is to pay the best rent, is willing to improve the estate which he is to enjoy. It does not follow that he would pay one shilling more rent though he did not bind himself to make the improvements.

9. In *Wright v. Smith*,(k) a lease under a power requiring the best rent was granted at a rent of 250*l.*, and the jury found the

property was at the date of the lease reasonably worth 400*l.* per annum: a verdict was found against *the lease*, [*392] on the ground, as expressed by the jury, that the best rent which could have been fairly obtained had not been reserved, *but that there was no fraud or collusion*. Mr. Justice Heath gave the defendant leave to move upon this special finding, as he doubted whether the clause did not apply only to cases where there was fraud and collusion between the tenant for life and the lessee, to prejudice him in remainder, not where it was fairly let; but the Court of Exchequer, after argument, properly refused to disturb the verdict.

10. In *Price v. Assheton*,⁽¹⁾ in a suit for a specific performance of an agreement to grant a lease made out by a correspondence, the intended lessor was tenant for life, with a power to lease for thirty-one years at the most improved rent. Upon a motion for dissolving an injunction, the Lord Chief Baron observed, during the argument, the defendant says in his letter, "I should not object to grant you a lease at a reduced rent, not taking advantage of such improvements made by you from this time." It might be a question, whether taking the rent without reference to the improvements was not inconsistent with the power. If it were worth the tenant's while to pay rent and also to make improvements, it shows that the rent taken by the landlord is not (according to the terms of the power) the most improved rent. In delivering judgment, he observed. But then it is said that the lease agreed to be granted was inconsistent with the power of leasing in the lessor. Now that power, as I find it set out in the answer, is a power to lease for thirty-one years, but the intended lease was only for twenty-one years, therefore, as far as concerns the duration it was within the terms of the power. But it is said, that according to the power, the best improved rent is to be reserved, while, according to the stipulations in the agreement, the rent was to be fixed by valuers at a fair valuation with reference to the improvements to be made, and the rent was "in no event to exceed the rent paid under the former [*393] lease. Now, if at the time of valuation the new rent should be less than the rent originally stipulated to be paid, then

it would not be the best improved rent ; but this state of things must depend upon the valuation. This, therefore, is not an argument which can be used in support of the motion for dissolving the injunction. But then another question of some nicety arises, namely, whether, although money was to be laid out by the plaintiff, and the rent to be estimated by the valuers without reference to the money so to be laid out, that is within the terms of the power. That may be a question of some nicety to be decided on the hearing of the case when the terms of the power are before the Court. *Prima facie* a rent so reserved is not an improved rent ; but here it was stipulated that the improvements should be made by the tenant in consideration of the new lease. It is difficult therefore to say whether that can be considered as an infringement of the power.

11. In *Muskerrey v. Chinnery*,^(m) to which we have before referred, by a settlement after marriage of the wife's estate it was limited to the husband for life, remainder to the wife for life, remainder to the eldest born son for life, remainder to his sons in tail male, with like remainder to the second son and his sons, &c., with the ultimate remainder in fee to the husband. And in the settlement, 1. Power was given to the husband from time to time, and at all times during his life, to lease or demise all or any part of the estates for any time or term of years or lives, and with or without covenants for renewals, and in case of the determination of all or any of the aforesaid lease or leases respectively, from time to time to make new or other leases thereof in manner aforesaid, and with or without any fine or fines, as he should think fit. By an indorsement on the deed a power of leasing for a limited term in possession at rack-rent was given to the sons. Leases were granted under the powers for terms of 999 years, in consideration of large fines, at rents and with privileges not usual in husbandry leases. Upon a case directed to the Court of C. P. in Ireland, they certified that the leases were not warranted by the power. Their opinion was understood to be that the usual restrictions in leasing powers must be implied

^(m) Lloy. & Geo. temp. Sugd. 185; Appendix, No. 18, *supra*, vol. 1, p. 523. Decree reversed, but afterwards again transmitted to Ireland, 7 Cla. & Fin. 1; *Muskerrey v. Sheehy*, 2 Jebb & Sym. 300; three Judges against one that the leases were invalid; see *Clark v. Smith*, 9 Cla. & Fin. 126.

in this case, and that the leases were contrary to the nature of the power. The case was decided upon another point in the Court of Chancery, but the Chancellor was of opinion that fines were authorized to be taken upon original leases, and the Lord Chief Baron was of the same opinion, in which the Lord Chief Justice was inclined to concur.

The first point made was, that the power did not authorize the receiving any fines, except upon renewals under covenants in prior leases under the power. The power, it was insisted, only authorized leases for any term of lives or years, at any rent he thought fit, and with or without covenants for perpetual renewal, either at a pepper-corn fine or for value; and that renewals might be granted upon taking fines, if authorized by such covenants, for renewals. The Judges were of opinion that a fine might be taken upon an original lease as well as upon a renewed lease—the words with or without fines overrode all the sentence. You may make leases with or without covenants for renewal, (and afterwards renew) and with or without fines. The sentence was interpreted only to introduce the right to renew under the covenants, and it was to lease for any time, at any rent, with or without covenants for renewal, and with or without fines. The latter words could not be confined to renewals. The power was to the husband *only*. Why should he grant a renewed lease upon a fine, and not an original one? Such a construction would only render it necessary for an original lease to be [395] granted for a short period, with a covenant for renewal on a fine, and then a fine could be taken. If nothing had been said about fines, yet they might have been taken under such a power. Was anything expressed which excluded the right to take them? Every thing was intended to be left to the discretion of the donee—the duration of the term, the quantum of rent, the amount of the fine. This was powerfully shown by the limited power of leasing giving to the sons. The power to mortgage, and the unlimited power in the settlement to charge the estate for the younger children, which would have enabled him to dispose of the whole estate in their favour, also aided the construction that the leasing power was not more unlimited in its terms than the parties intended; but we have already observed upon this part of the case.

12. But it is not sufficient to impeach a *bona fide* lease without a fine, at a rent which the Jury find a fair rent, that the tenant for life had offers of higher rents from other persons, against whose responsibility nothing appears. And where the transaction is fair, and no fine or other collateral consideration was taken by the tenant for life leasing under the power, or injurious partiality manifestly shown by him in favour of the particular lessee, there ought to be something extravagantly wrong in the bargain to set it aside on this ground; for in the choice of a tenant there are many things to be regarded besides the mere amount of the rent offered.(n)

13. In the *Queensberry* case, in the House of Lords, Lord Eldon, in speaking of powers to lease at the best rent observed. "There is but one criterion which our Courts always attend to as a leading criterion in discussing the question, whether the best rent has been got or not; that is, whether the man who makes the lease has got as much for others as he has for himself; for if he has got more for himself than for others, that is a ['396] decisive evidence against him. The court must see that there is a reasonable care and diligence exerted to get such rent as, care and diligence being exerted, circumstances mark out as the rent likely to be obtained."(o)

14. Under a power to lease for any term not exceeding ninety-nine years from the date of executing the lease, so that there should be reserved to be payable during the continuance of the term the best rent that could be obtained without taking any fine, a lease was granted for thirty years at a rent of 270*l.*, and at the same time another lease in reversion for sixty-three years at a rent of 120*l.*, and the last lease contained a covenant to rebuild, it was held that the leases were void, although the Jury had found that, taking into consideration the covenants to rebuild, the rents were the best that could be obtained. For the question was, whether they were the most beneficial to the *reversioner*? and it was clear that whatever rent was reserved should be reserved during the continuance of the term.(p)

15. And where the power requires the true and ancient rent, it

(n) *Doe v. Radcliffe*, 10 East, 278.

(o) MS. See 1 Bligh, 427.

(p) *Doe v. Harvey*, 1 Barn. & Cress. 426; 3 Dowl. & Ry. 589.

is not sufficient that it is reserved to the remainderman, but it ought also to be reserved to the lessor himself; and therefore if he reserve a less rent to himself during his life, and after his death the true and ancient rent, the lease is not good; (q) and the rule would equally apply to the usual power to lease at the best rent. (r)

16. Where the power prohibits a fine from being taken, or even requires the best rent, it has been doubted in practice whether a new lease granted upon the surrender of an old one at an *increased* rent is valid; of course the lease would be void if the increased was not the proper rent. But as the tenant for life receives an immediate addition to the rent, it has been argued that the increased rent is equivalent to taking [*397] a fine at the expense of the remainderman, for it is assumed that if the old lease had been permitted to run out, a larger rent might have been obtained: and of course if a fine is prohibited, the taking of one will avoid the lease, although the best rent can be obtained. But there is no weight in this argument, if the renewed lease really do comply with the terms of the power. The lease may, as we have seen, be renewed at any time, and the donee need not await its expiration by effluxion of time, or sooner determination by forfeiture. But the existence of a lease, beneficial to the lessee, will not justify the grant of a new one at a less rent than the property is worth at the time. (s)

17. Of course in a power to grant building-leases, the term *best rent* must, although not expressed, be understood to be the best rent which can be obtained with reference to the gross sum to be laid out by the tenant in building or improvements. So as in ordinary cases, the rent must be regulated upon the nature of the other obligations assumed by the lessor and lessee and warranted by the power. If the tenant be to keep the premises in repair, the rent is so much less; if the landlord be to repair, the rent is the greater. It is a question for a jury, whether taking into consideration the repairs to be made by the landlord or tenant, the rent reserved is the fair one. (t)

(q) Mountjoy's case, per C. J., 5 Rep. 6 a, b.

(r) See 1 Burr. 121.

(s) Wright v. Smith, 5 Esp. Ca. 203.

(t) Per Le Blanc, J. 12 East, 308, 309.

18. In a late case.(u) before referred to, where in a lease, under a power by a tenant for life, he covenanted in every year *during his life*, upon the request of the lessee, to grant a new lease upon the same rents, &c., as in the first lease, it was argued that the covenant for renewal avoided the lease: it operated indirectly upon the interest of the remainder-man, though it only bound the tenant for life directly. The lessee would [*398] not of course apply for a renewal unless it was *for his benefit, and the remainder-man loses one of the checks which in general operate in his favour on the tenant for life, to reserve the best rent; for the tenant for life may, for fear of an action on the covenant, be induced to renew at less than the best rent, at the time when such renewal is applied for; and the difficulty upon the remainder-man of proving that a better might then have been had is enhanced in a greater degree, when other uncertain computations are to be taken into the account, than if the question were confined to the mere amount of the gross rent reserved. Lord Ellenborough, in delivering judgment, said, that as to the covenant for renewal, it is said that it has a tendency to induce the lessor to run the question on the *quantum* of rent reserved very closely; for if he renewed at the end of twenty years from the first granting of the lease, the remainder-man might have a lease fixed on him for twenty-one years from that time, reserving less than the best rent which could then have been reserved; but the answer is, that if the fact were so, the lease would be void, and the remainder-man might bring his ejectment and recover the premises.

19. Where a contract is made to grant a lease at a future period, under a power to lease in possession at the best rent, and the donee live to come into possession, yet the question as to the rent is whether the rent agreed upon was the best rent at the time the lease is to commence.(x)

20. Where a power requiring the best rent, also required that no power should be *given* to any lessee to commit waste, and that the lease should contain usual covenants, and a lease was granted by which the lessor covenanted to do part of the repairs, and in case of neglect the tenant was authorized to do them, and deduct

(u) Doe v. Bettison, 12 East, 305.

(x) See *Bowell v. Dew*, 1 You. & Coll. C. C. 345.

the expense out of the rent, the Jury found that the rent was the best rent and that the covenants were usual ones:—It was contended—first, that the lease amounted to an exemption from punishment for *permissive* waste, which, it was [*399] said, was within the power—secondly, that the covenant enabling the lessee to deduct the expenses of repairs was unusual and contrary to the power. Mr. Justice Bayley observed, in answer to the first objection, that the restriction on the power of leasing was only that the lease should not contain any clause whereby any power should be *given* to the lessee to commit waste. Does not, he asked, the argument come at last to the *quantum* or sufficiency of the rent reserved? If the tenant be to keep the premises in repair, the rent is so much less; if the landlord be to repair, the rent is the greater. It was a question for the Jury at the trial, whether, taking into consideration the repairs to be made by the landlord, the rent reserved was the fair rent. In delivering judgment, Lord Ellenborough observed, that as to the first objection, the power stipulates against any clause in the lease whereby any authority shall be *given* to the lessee to commit waste, &c., and the answer to that objection is, that no such power or authority is given to the lessee, nor is he thereby exempted from the punishment for committing waste; for the burthen of repair in the mansion-house is thrown by the lease on the landlord, and it was incumbent on the plaintiff's counsel to have shown, that according to the terms of the power no such burthen could be thrown on the landlord; but that is not prohibited, and therefore the argument falls to the ground. Next, the covenant provides, that if repair should be wanted on the roof of the mansion, which the landlord took upon himself, and he did not repair it, the tenant might make the repair and deduct the charge out of the rent reserved to the lessor. What objection can there be to provide for setting off the one demand against the other?(y)

21. Formerly these powers required the ancient or usual rent to be reserved, but at the present day this practice is very properly exploded.(1) Where such a term is [*400] introduced, the better opinion is, that as a general rule,

(y) *Doe v. Bettison*, 12 East, 305.

(1) As to the kind of evidence of the ancient rent admitted in these cases, see *Roce v. Rawlins*, 7 East, 272.

the rent reserved at the time of the creation of the power, where a lease was then in being, or last before it, where no lease was then in being, is the rent to which the power must be taken to refer. (z) But it is no objection that *more* than the ancient rent is reserved, (a) nor that heriots, or other *casual* or *accidental* services, which have been usually rendered, are *not* reserved by the lease under the power. (b) But if the ancient *reservations* are required that goes further than the rent, and if heriots were formerly reserved they must be secured. But a difference in the form of the reservation will not vitiate the lease. (c)

22. It should seem that where the usual rents are required to be reserved, and a certain sum was formerly paid, with a covenant by the lessee to pay all the taxes, a reservation of the like rent, without a similar covenant, would be a fraud on the power, for the new rent would only be nominally the ancient rent, as it would be subject to a deduction for the land tax and other taxes, which would in effect reduce the rent below the sum anciently rendered. (d)

23. In *Goodtitle v. Funucan*, (e) where the power required there should be reserved so much, or as great yearly rents as or more than now is or are paid, but was silent as to covenants, it was insisted that the covenants by the lessor lessened [*401] the value of the rent reserved. Lord Mansfield said the power made no mention of covenants. The ground, therefore, must be that the present covenants *were a fraud on the power*, by lessening the value of the reservation: but on considering them fully, it appeared that what was thrown on the landlord was compensated by what was paid by the tenant. An objection of this nature goes to its not being the usual and accustomed rent.

(z) See *Morrice v. Antrobus*, Harl. 325; 3 Cha. Rep. 66-68, accordingly per Holt, C. J.; But see *ib.* 73, *contra* per Lord Ch. Cowper; and see *Right v. Thomas*, 3 Burr. 1441, 1 Blackst. 446; *Doe v. Creed*, 4 Man. & Selw. 371; *Doe v. Lock*, 2 Adol. & Ell. 705.

(a) See 3 Cha. Rep. 78.

(b) *Baugh v. Haynes*, Cro. Jac. 76; Mo. 759; Co. Lit. 44 b; *Coventry v. Coventry*, 1 Com. 312.

(c) *Doe v. Lock*, 2 Adol. & Ell. 705, *infra*.

(d) See *Earl of Cardigan v. Montagu*, App. No. 13 (8); *Goodtitle v. Funucan*, Dougl. 565; *Doe v. Wilson*, 5 Barn. & Ald. 363.

(e) *Dougl.* 565.

But where the clauses were in the former leases, it is the usual and accustomed rent, reserved in the usual and accustomed manner.(f) If the ancient rent is required to be reserved in as beneficial a manner as before, no especial direction is necessary for the insertion, for example, of a power of re-entry, which was in the former leases, for it must be reserved as theretofore.(g)

24. Where a power was given by a will to a tenant for life, to lease landed estates for twenty-one years, at the *most rent* that could be got, and houses and ground in Middlesex and London, for any term of years not exceeding sixty-one, at the *usual* or other the *most rent* that could be got for the same, and at the date of the will the London houses were in lease for forty-one years, at a rent of 6*l.*, for which a fine had been paid, the Court of King's Bench held that the Middlesex and London property might be demised at the old rents, taking a fine; *usual* was considered as contrasted to *most*. If the property in London had been situate in a ruinous part of the town, in such a case, the tenant for life might not have been able to get the usual rent, and then he was to get the most.(h)

25. The word *rent*, in powers of leasing, is with great propriety construed to mean not money merely, but any return or equivalent adapted to the nature of the subject demised: therefore upon a lease of mines, a due proportion of the produce may be reserved as a tender in lieu of money, *although the [*402] power requires a "rent" generally to be reserved.(i)

26. When it is ascertained that the proper *quantum* of rent is payable, the next question is, whether the form of the reservation be proper.

27. Where from the quantity and nature of the property demised, it is impossible to ascertain whether the rent reserved is the best rent, the execution of the power cannot be sustained, as where a donee of a power to lease at rack-rent leased an honour and sixteen manors and other estates with a park and deer there-

(f) See 5 Barn. & Ald. 393, 394.

(g) See Doe v. Smith, D. P. *infra*.

(h) Doe v. Creed, 4 Mau. & Selw. 371.

(i) Campbell v. Leach, Ambl. 740; Bassett's case cited. *ib.* 748.

in, by one lease at 600*l.* a year, the lease was deemed invalid, by reason of the general extensive, casual, and uncertain natures and values of the greater part at least of the premises, and the great difficulty, if not utter impossibility, arising from thence of forming any judgment whether the rent thereby reserved was the best rent that could have been obtained. (*k*)

28. The *bona fide* reservation of rent for the enjoyment of the estate prior to the lease, as where the lessee is in possession, and the lease is granted in a broken half year, does not vitiate the lease: (*l*) but a rent must be reserved for the whole of the term.

Therefore where the power required the best and most approved yearly rent to be reserved, and the lease was dated the 14th September, 1809, and was for twenty-one years from the day of the date of the lease, payable by two even half-yearly payments on the 29th of September and 25th of March, the first payment to be made on the 25th day of March then next, the lease was held void: because, as the rent was made payable on the 25th of

March and the 29th of September, and the term of the [403] lease would expire on the 14th of September, there would be no rent payable under it from the 25th of March preceding the expiration of the term. (*m*) But there, there was a clear loss of one half year's rent; not twenty-one years' rent, but only twenty and a half was reserved. (*n*)

29. Where the *usual* or *ancient* rent is required, generally it must be reserved in the way it has commonly been; if gold has been usually reserved, silver cannot be made payable in lieu of it; if it were commonly paid at four days, a reservation at one, two, or three days would be void: but where, by the restraining statute 13 Eliz. c. 10, s. 3, leases were made void unless the accustomed yearly rent, or more, should be "reserved and payable yearly" during the term, it was held, that a reservation to be paid half-yearly, where it was payable quarterly before, was good; for it was sufficient if the accustomed rent be reserved yearly at

(*k*) See *Earl of Cardigan v. Montagu*, App. No. 13 (2). Note, there was another objection to the lease.

(*l*) *Isherwood v. Oldknow*, 3 Mau. & Sel. 382. S. C. MS.

(*m*) *Doe d. Wilmot v. Giffard*, B. R. 22 Feb. 1810, MS.; 5 Barn. & Ald. 371; see *Doe v. Wilson*, 5 Barn. & Ald. 363; *Fryer v. Coombs*, 11 Adol. & Ell. 403.

(*n*) *Doe v. Rutland*, 2 Mees. & Wels. 666; 10 Cla. & Fin. 419; vide *infra*.

one time, for the words of the act are, "whereupon the accustomed yearly rent or more shall be reserved;" and therefore, if the rent be yearly reserved, the statute is satisfied by reason of this word *yearly*.(o) So that, although the lease was made void unless the accustomed *yearly* rent or more should be *reserved and payable yearly*, yet as that authorized a yearly payment in one sum, it was assumed to be clear, and was so decided, that a reservation half-yearly was valid; and therefore, if a power require the *yearly* accustomed rent to be reserved, the rent may be made payable at one time, or at several periods.(p)

30. In the case of Doe v. Lock(q) the power required the ancient rent and reservations to be reserved. The old lease reserved the rent half-yearly, the lease under the power quarterly; and although it was unnecessary to decide [*404] the point, the Court discussed it at great length. They observed, that on a quarterly reservation, if the tenant for life died in the first portion of the half year, the remainder-man would receive both the first and second quarter's rent of the half year, and would therefore be in the same situation as if the rent had been reserved half-yearly; but if the tenant for life died in the second quarter of the half year, the tenant for life would receive the first quarter, and the remainder-man only the second quarter: and he would consequently be in a worse situation than if the rent had been reserved half-yearly. This, however, was only a contingency, and might or might not happen; and it was to be seen whether that would avoid the lease. After citing Mountjoy's case, the Court observed that if this decision were correct, it seemed difficult to say that a lease is void for reserving the rent at four days instead of two; the new lease need not be a facsimile of the old one; all that is to be done is to see that the remainder-man is not prejudiced. And there could be no doubt but a rent payable at four feasts was, upon the whole term created, more beneficial than if payable at two feasts, though there is a possibility that as to one quarter the remainder-man may be prejudiced; but that is a contingency; and even if it does happen, there is the benefit of the quarterly instead of the half-yearly

(o) Mountjoy's case, 5 Rep. 3 b. 6 a.

(p) See Campbell v. Leach, AmbL. 740; Earl of Cardigan v. Montagu, App. No. 13.

(q) 2 Adol. & Ell. 705.

payments during the rest of the term. After examining the *authorities* to show what effect has been given to the increasing the number of rent days, the Court concluded by observing that it was very difficult to come to a conclusion on this part of the case.

31. Where the rent is required to be reserved at particular days, it must of course be reserved accordingly; but where merely the best *yearly* rent is required to be reserved, it may be made payable quarterly, or half-yearly.^(r) Even where the [*405] power requires there to be reserved and *made payable yearly*, the usual and accustomed yearly rents, it authorizes the reservation in portions at the days on which the rents have been usually reserved. This, we have seen, was decided in Mountjoy's case. In the recent case of Doe v. Wilson, which arose upon a power in a private act of parliament, the same words were introduced into the power; and although the statute which created the power in the former case was incorrectly quoted as *not* saying (which it did) that the rent should *be payable* yearly, but only that the accustomed yearly rent should *be reserved*; yet the Court, without hearing the defence, decided that a half-yearly reservation was good. The ancient rent had been so reserved; but that, as we have seen in Mountjoy's case, is not material, so that in such a case the rent may it seems be reserved half-yearly or quarterly. In Doe v. Wilson^(s) the Court observed, that it was admitted, that if the words of the power had been "so that there be reserved and made payable during the continuance thereof, the usual and accustomed yearly rent," without the word "yearly" immediately following the word "payable," a rent reserved half-yearly would have been sufficient; that is, that a payment by portions at the end of each half-year, or at the end of each quarter of the year, does not prevent the rent from being, in the common understanding of mankind, and in common parlance, a yearly rent. The Court could not see any reason why the words "payable during the continuance thereof" should make any difference; it could not suppose the legisla-

(r) Campbell v. Leach, Ambl. 740; 6 Rep. 38 a. See Earl of Cardigan v. Montagu, App. No. 13.

(s) 5 Barn. & Ald. 363; and see Doe v. Rutland, 2 Mees. & Wels. 661; and 5 Mees. & Wels. 696; Fryer v. Coombs, 11 Adol. & Ell. 403.

lature intended in this case to make the rent payable only once a year, which certainly is unusual, and not beneficial to the landlord. To adopt the construction contended for would be to suppose that the legislature intended that the leases to be granted under the Act of Parliament should be different in their form and effect from ordinary leases of lands and tenements granted at beneficial rents: the ordinary *reservation of rent in [*406] leases is “yielding and paying yearly and every year.”

In this case the words are yearly, during the continuance thereof, the usual and accustomed yearly rent, which means the yearly rent of so many pounds by so many half-yearly or quarterly payments in the year, and they ought to construe these words “payable yearly” with reference to the common language of leases, which was the subject respecting which the parties were speaking in the clause before them. The words “made payable yearly” were considered the same as if the words had been “payable every year.” In common parlance the word yearly in such powers means not a payment of rent once a year, but that the same is to be paid in or during every year. In one sense a rent reserved half-yearly is payable yearly, because it is payable during the year.

32. In the prior case of *Cardigan v. Montagu*,^(t) where the words were very powerful, the objection was not taken; the point no doubt was considered at rest.

33. A reservation of the rent *before* the usual day of payment is said to be valid, because payment before the day is payment at the day;^(u) but this would not be valid where it gave a benefit to the tenant for life at the expense of the remainder-man. And it seems clear that the rent cannot be reserved *after* the day appointed.^(x)

34. In *Doe v. Wilson*^(y) where the power was to lease for twenty-one years, or any term of years determinable upon three lives, “so as upon all and every such lease and leases there be reserved and made payable yearly during the continuance thereof the usual and accustomed yearly rents, boons, and services

(t) App. No 13.

(u) See 2 Lord Raym. 1198.

(x) *Ludlow v. Beckwith*, 11. 90.

(y) 5 Barn. & Ald. 363, *Fryer v. Coombs*, 11 Adol. & Ell. 403.

for the same," and the lease was dated from the 6th of January 1785, for ninety-nine years, at a rent payable at Lady-day and Michaelmas in every year, and a similar lease had been [*407] granted before the *creation of the power, it was held that the lease was valid. The Court said that the objection was, that the rent being reserved half-yearly, the first payment was to take place at a period less than half a year distant from the day of the demise, and in support of that objection the case of *Doe v. Giffard* was cited : (z) that case, however, is very distinguishable from the present. In that case the power was to lease at the best and most improved yearly rent that could be obtained. The power under which this lease was granted requires that there be reserved the usual and accustomed yearly rent. Now, as far as the Court had any evidence what the usual and accustomed yearly rent was, it appears to have been a yearly rent payable at Lady-day and Michaelmas. The Court therefore was of opinion that a rent payable at those days, although the right to demand it arose in less than half a year, was a usual and accustomed rent within the meaning of those words in the condition contained in the leasing power. Indeed, when they considered that this was a lease for lives granted upon the surrender of another lease, they could not help seeing that it was in effect an extension of time upon fresh terms ; and where the time only is extended, it is most reasonable that the day of the payment of the rent should continue to be the same, and should not vary according to the day on which the new lease may happen to be granted.

35. And where the power required the rent to be reserved by half-yearly payments, a lease reserving at the feast of St. Philip and St. James (1st May) and St. Michael (29th September) was held void, because the half-yearly payments ought to have been on several days of payment, and the rent divided as near as may be into two equal half-yearly payments ; which this did not, one interval being 151, and the other 214 days, though the custom of the country might make a different division. The tenant for life is not to throw on the remainder-man, without his sanction, the *uncertainty of the chances which may turn out to his prejudice. (a)

(z) *Supra* pl. 28.

(a) *Doe v. Morse*, 4 Tyrw. 185; 2 Crompt. & Mees. 247.

36. Some observations were thrown out in this case against the validity of the lease, on the ground that the rent was reserved *too soon*, so that the tenant for life might thereby obtain a year's rent for less than a year's occupation. But in a later case, *(b)* where the power required there to be reserved the best improved yearly rent, &c., and the rent was reserved half-yearly, and the *last* half-year's rent was made payable in August, although the year did not expire until Michaelmas; the reservation was held to be valid. The Court thought there was no pretence for saying that there was any object to defeat the remainder-man's claim; on the contrary, the reservation of the last half-year's rent, before the complete expiration of the year, is a matter of prudence and caution, and is, in general, for the benefit of the lessor, whoever he may be. It could only be detrimental to the remainder-man on the supposition of the tenant for life dying after the day in which the last half-year's rent is reserved, and before the expiration of the term; a supposition very highly improbable. The manifest intention of the testator was, that the rent should be apportioned in twenty-one yearly payments; there was no direction further; it might be paid quarterly, half-yearly, or yearly. There being, therefore, no direction on the subject, it would be quite sufficient to make it payable yearly, within each of the twenty-one years. But this was reserved in the Exchequer Chamber. *(c)* The Court did not think that the last payment could be properly called a fine or increase; but whether it did not cause a part of the term to be exempt from rent, so that the rent could not be said to be made payable during the continuance of the lease, was a much graver question. They considered *Isherwood v. Oldknow* as a peculiar case, and that you [*409] cannot remove the inconvenience of not being able to distrain for the last half-year's rent, by the risk of placing in the power of the tenant for life a considerable sum of money which properly belongs to the reversioner; and it would follow from the contrary doctrine, that rent might be reserved beforehand. This last determination was, with considerable difference of opinion, reversed in the House of Lords, and the lease held good. *(d)*

(b) Doe v. Rutland, 2 Mees. & Wels. 661.

(c) Rutland v. Doe, 5 Mees. & Wels. 688.

(d) Rutland v. Doe, 12 Mees. & Wels. 355; 10 Cl. & Fin. 419.

37. In these cases a difference of words is not material ; therefore a reservation of eight bushels of grain in lieu of a quarter, is good, because it is all one quality, value and nature.(e)

38. But strictness on this head has been carried so far, that it has been considered that two several farms not usually let together, could not be joined in one demise with a reservation of one and the same rent ; nor a *parcel* of a farm rendering rent *pro rata*.(f) The questions have generally arisen upon leases under the statutes by ecclesiastical persons, tenants in tail, and husbands seised *jure uxoris* ; and notwithstanding the cases in the books, a lease of part, at a rent *pro rata*, was considered as valid by very able lawyers. And the doubt to the contrary has, so far as it relates to ecclesiastical leases, been removed by a late act of Parliament,(g) which act, very unaccountably, does not remove the doubt as to leases by tenants in tail, or husbands seised *jure uxoris*, nor does it validate leases by ecclesiastical persons of two or more farms together, which have been usually let separately.

39. The point upon a private power arose in the late case of Doe v. Wilson,(h) and the Court held the apportionment valid.

The Court said, the question was whether or not it is [*410] competent to the owner of a considerable estate to make any improvement or alteration in the mode of disposing of that estate ? If he cannot divide a farm, but is bound to let it altogether as it formerly was, improvement must in many cases be utterly prevented, and the remainder-man be deprived of the benefit. Independently of authority, they should have thought that that which was for the benefit of the estate might be lawfully done, and that an apportionment of rent might be made ; and that the land might be subdivided, provided care was taken to apportion for the parts of the farm so divided as much rent as had been reserved in respect of them in the lease comprising the whole. Lord Mountjoy's case had been cited upon this point. The doctrine there laid down upon this subject, however, was not the point which the Court there decided ; and the very learned person in whose report that doctrine is found, had, in his commentary on

(e) Mountjoy's case, 5 Rep. 3 b. See 3 Cha. Rep. 75, 1 Burr. 121.

(f) 5 Rep. 5 b ; 3 Cha. Rep. 75 ; Smith v. Trinder, Cro. Car. 22.

(g) 39 & 40 Geo. 3, c. 41.

(h) 5 Barn. & Ald. 363.

Littleton, expressly laid it down as law that there may be a leasing of part, reserving a rent bearing the same proportion to the former rent as the part leased bore to the whole land. He says, "If tenant in tail let part of the land accustomably letten, and reserve a rent *pro rata* or more, this is good, for that is in substance the accustomable rent;"—Co. Litt. 44 b; and Lord Mountjoy's case is referred to in the sentence immediately preceding. The Court was of opinion, that the law so laid down by Lord Coke was consonant to reason, and that it was competent to lease a part, reserving a true and fit proportion of that rent which had formerly been reserved. The case of *Smith v. Trinder* was an authority upon that point. It was true that the 39 & 40 Geo. 3, c. 41, after reciting that doubts had arisen whether ecclesiastical persons could lawfully grant separate leases of parts of lands usually demised by one lease and under one rent, enabled them so to do, but they were not necessarily to infer from thence that those doubts were well founded. Acts of Parliament for the purpose of removing doubts are very beneficial, because they prevent "that expense of litigation which otherwise [*411] must take place in order to have such doubts resolved. For these reasons this was held to be a good and valid lease.

40. It is clear, that the mere circumstance of the rent being reserved out of the land, *and* recent improvements on it by building, will not vitiate the lease, although, as it has been argued, part of the rent issues out of the new building. (i) To prevent any doubt on these points, where powers are given to lease at the ancient rent, it should expressly be declared that leases may be made of part, at rents *pro rata*, and that lands usually demised by several leases at several rents may be demised by one lease at the aggregate of the old rents.

41. In the case of *Doe v. Lock*, (k) a power of leasing was given by a will to the testator's wife, to whom the estates were given for life in the following form: To lease the London houses, &c., for twenty-one years in possession; and to lease the estates in the manor of A. for ninety-nine years, determinable on one, two, or three lives in possession, reversion, or remainder, of such part as then was or had been anciently demised for one, two, or

(i) *Read v. Nashe*. 1 Leo, 147; *Bridg. by Ban.* 607.

(k) 2 Adol. & Ell. 705.

three lives in possession or reversion, "so as the ancient and accustomed yearly rent and reservations be thereby reserved;" and to lease the farms in the parish of A. for twenty-one years at rack-rent, and so as the tenants were not dispunishable of waste; *all* such leases to be made and granted in the same manner and form, and with and under such and the like reservations, restrictions, covenants, conditions, and agreements, as are usually and customarily contained in leases of the like kind in the several parishes and places where the same premises are situated. A lease was granted at the ancient rent of land in the manor, excepting all timber trees, bodies of pollard and other trees, with liberty to the lessor, &c., to fell and carry the same [412] away. "In the only old lease produced of the same premises, the exception was of all timber trees, and trees likely to prove timber, without more. In leases of the same kind in the same parish, the exceptions of timber very much varied, so that it was contended there was no usual reservation. The Court held that these leases were admissible in evidence, but that they only applied to the second set of provisions, and could not affect the first part, which required the ancient rent and reservations, because as to these it is only the rent and reservations of the particular power which are to be attended to. The Court then held that what related to the wood was not a reservation but an exception, and therefore, of course, it was not required by the first set of provisions, which only required the ancient rents and *reservations*. But still the court held the lease bad, because the bodies only of trees likely to prove timber were excepted, and not, as in the old lease, the entire trees likely to prove timber. They considered the demise as comprising the tops, tops, and boughs of the trees likely to become timber; and therefore the ancient rent was not reserved, because more property was demised than was contained in the old lease. They thought it not material whether a rent could issue out of the tops of the trees or not. And as the bodies only were reserved, the lessors could not cut the bodies down, for they could not do so without also cutting down the tops; and as to which they would have no right to do so, because the lessee would have an interest in them for repairs and fuel, and for the fruit, and shade for his cattle.

42. We may observe that the rent could be hardly said to issue out of the tops of the trees; and it may be thought that the express power to cut and carry away the trees would necessarily determine the tenant's right to the shade, &c., and that the lessor would take both bodies and branches. Effect must be given to the power to fell and carry away the trees, and the mere demise of the tops of the trees, &c., might be *con- [*413] sidered to give no general right of property to the lessee. The case of *Smith v. Bole*, to which it was compared, (*l*) appears to be distinguishable; for that was the case of a lease by a prebend, without any exception of wood or trees; whereas in the old lease there was an exception of the great wood (which was 40 a.,) *scil.* oak, ash, and crabtree; and it was made a question whether the soil of the whole wood, or only the trees and as much of the soil as was sufficient to sustain the trees, was reserved; but in either view the decision against the validity of the lease was correct, as more property was demised by the new than by the old lease. If the exception in *Doe v. Lock* had been the same as in the old lease, yet, 1, the trees notwithstanding the exception, would have remained as parcel of the inheritance; 2, the soil itself was not excepted, but sufficient nutriment for the growth of the trees; 3, the lessee would have had the pasture under the trees; nothing should be recovered in waste but the circuit of the root, and not the latitude of the branches; 4, the lessee would have had all the benefits of the trees: and 5, the young of all birds that breed in the trees, and the fruits; (*m*) so that, whether excepted or not, the lessee took an interest in the lops, tops, and branches. But as the body of the trees was excepted, it seems that the exception was as ample, as regarded soil, as that in the original lease. The rent was the ancient rent, and issued, it would seem, as before, out of the lands demised. The exception may be thought to fall within the second set of conditions; and if so, the question was whether the lease was granted in the manner and form of the leases referred to in that part of the leasing power.

43. In the same case a question arose upon the exception of mines, &c. The old lease contained an exception of all mines

(*l*) *Cro. Jac.* 458; 3 *Bulstr.* 290; 2 *Ro. Abr.* 455 (*u*) pl. 1.

(*m*) *Lifford's case*, 11 *Rep.* 50 a.

and quarries of *stone and slate*, and all *other* mines [*414] whatsoever. And it was held, of course, that an exception in a new lease of all mines of tin toll, tin works, copper, lead, and all other mines, minerals, and metals whatsoever, and quarries of stone and slate, was although not precisely in words, yet in substance, conformable to the power. But an exception in another lease of all mines of tin, toll tin, tin works, copper, lead, and all other *mines*, minerals, and metals whatsoever, with liberty to dig, &c., for all minerals and metals, the Court said might be questionable.

44. The rent to be paid should, in strictness, be specified in the lease; but although the reservation be made in the very words of the power, without stating the sum in particular, the lease will be supported if the reservation have reference to some standard by which the rent can be ascertained with certainty and ease, for *id certum est quod certum reddi potest*; but if the reservation be vague and indefinite, and not easily reducible to a certainty, the lease will be void. As an instance of the first rule may be quoted the case of *Lewson v. Pigot* : (n) where, under a power to make leases of certain lands, reserving 12*d.* for every Cheshire acre, a lease was made of all the lands, “reserving all the rent intended to be reserved,” and the lease was determined to be valid: because, Lord Chancellor Cowper observed, there was an absolute mathematical certainty, than which nothing can be more certain: the very power provided it should be so; at least, 12*d.* for every Cheshire acre. (o) It was only necessary, therefore, to compute the number of acres in order to fix the rent. (p) And in a recent case, where a tenant for life, with a power of leasing, contracted to grant a lease at the yearly rent of seven pounds for every acre the lands, upon a proper survey to be had, should appear to contain, and so in proportion for every lesser quantity than an acre: the uncertainty of the rent was objected against [*415] the performance of the agreement, but Lord Redesdale said, that he did not think it uncertain, for it was capable of being reduced to a certainty; and it was a common form

(n) 3 Cha. Rep. 61, cited.

(o) See 2 Cha. Rep. 76.

(p) And see *Audley v. Audley*, 2 Cha. Rep. 82; but note, there the power did not require the reservation of any rent.

of reserving the rent in the country where the land was situated. Every executory contract must contain this species of uncertainty ; but if it contains all that leads to future certainty he took it to be sufficient ; and he accordingly decreed a specific performance of the contract.(q)

45. The second rule is exemplified in the great case of *Orby v. Mohun*,(r) where the power was to grant leases of all lands anciently demised at the ancient rents, and of the other lands at the best rents that could be gotten. The power was exercised by two leases, by one of which all the lands not anciently let were demised, reserving thereon “ *the best improved rents* ;” and by the other, *all* the lands within the power were let, reserving the “ *ancient and accustomed rents* ;” so that instead of specifying the sums to be paid as rent, the words of the power were repeated. The cause was heard before Lord Keeper Cowper, assisted by the two Chiefs, Holt and Trevor : they unanimously agreed that the lease was void as to the demesnes, because the remainder-man could not possibly tell what to demand under the reservation of the *best improved rents*.

But as to the lands anciently demised, Lord Chief J. Holt held that the rent was certain enough, and the lease good. It must be admitted, he said, that a power to lease, reserving the *ancient rent*, is a certain power, and well enough to be understood what it is, and what it means ; and why, he asked, shall the same words that create and reduce the power to a sufficient certainty, when turned into a lease, render it uncertain ? The same certainty that is in the power is carried over into the lease, which is the execution of it ; but neither in the one or the other is it mentioned “ *what the old rent is but that may be aver-* [*416] *red, and that is certain which may be made certain.* But the Lord Keeper and Lord C. J. Trevor were of opinion that the rent, even as to the lands anciently demised, was not certain, and that therefore the lease was void. They argued, that as the intent of the settlement was(s) that the tenant for life in possession might lease, so it was on the other hand that the revenue should

(q) *Shannon v. Bradstreet*, 1 Rep. t. Redesdale, 52.

(r) 2 Vern. 531. 542; Prec. Cha. 257; 2 Freem. 291; best reported in 3 Cha. Rep. 56.

(s) 2 Vern. 543. 544.

not be diminished, but the ancient rent at least reserved, and in such beneficial manner as might with certainty, and without any difficulty, be recovered ; and for that reason it was provided that there should be a counterpart of the lease, that it might be better known what the rent was, and how to recover it. If the rent had been mentioned in the lease, there, if the tenant had refused to pay it, the proof would have been turned upon the tenant to show the rent in his lease was not the ancient rent ; and if he should do so, it would make his lease void. But as the lease was contrived, the remainder-man might be baffled and nonsuited twenty times before he could declare or avow in certain for the rent payable in the lease ; and yet the tenant still holds the land, and doth not prove his own lease void, as must have been done in the other case. Where there is a power of leasing in general words, as reserving the ancient rent, in the execution of the power which is to be explained and made certain, the rule, *certum est quod certum reddi potest*, is to be understood of a reference to that which is absolutely certain, to former letters-patent or the like : but this is rather a delegating the power of leasing to the plaintiff, than an execution of the power, and is the first attempt of the kind ; and it is a good rule, that what never has been, ought never to be ; and therefore they adjudged the lease to be void, and this decree was confirmed in the House of Lords.(t)

[*417] *46. It is perfectly clear that several demises may be comprised in one deed,(u) although very subtle distinctions are taken between what are and what are not distinct reservations, so as to constitute several leases. It frequently happens that lands comprised in a power are demised in the same lease with lands not comprised in the power ; or lands are demised, as to some of which the power is duly complied with, and as to others, it is not ; and in these cases the validity of the lease depends upon the *quantum* of the rent reserved, and the mode of the reservation.

47. The first question arose in Mountjoy's case,(x) where the party was precluded from making any alienation, except for certain terms reserving *the ancient rent*, and the property was de-

(t) 3 Bro. P. C. 248, nom. *Duchess of Hamilton v. Mordaunt*; and see *Owen v. Thomas*, reported Cro. Car. 94; 3 Keb. 380, cited.

(u) See *Doe v. Rendle*, 3 Mau. & Selw. 99.

(x) 5 Rep. 3 b.

mised, together with certain free rents, heriots, &c., which as they had never been let did not fall within the power, at one rent, being a sum equal to the aggregate of all the rents then paid, and the yearly value of a small piece of waste; the lease was held to be void, and it was resolved that no apportionment (if any should be in these cases) would make the render good, *for the heriots, &c. could not be reduced to a yearly value.* Mr. Justice Dampier observed, in a late case, that the grant and render of one entire rent in that case tended to destroy the evidence of the ancient rent.(y)

48. And in *How and Whitfield*,(z) the *ancient rent* was required to be reserved, which amounted to six shillings per annum, and by the pleadings it appeared that the lands within the power *inter alia*, were demised, reserving *proinde* six shillings per annum; and the Court thought it might be intended that the *inter alia* might comprehend nothing but *such things out of [*418] which a rent could not be reserved, and then the six shillings were reserved only for the five acres (the land comprised in the power.) However, the *proinde* might reasonably be referred only to the five acres, and not to the *inter alia*; and that a distinct reservation of six shillings might be for five acres; and judgment was given accordingly. Thus the case is reported in *Ventris*; but even on that statement the Court does not appear to have decided, what it would have been difficult to do, that a lease of lands comprised in the power, and other lands, yielding *therefore* a single rent, sufficient only for the lands in the power, should be held to issue out of them only. The Court appears merely to have taken advantage of the pleading, and to have *intended* that there was a *distinct* reservation of the six shillings for the lands comprised in the power, which certainly would have been valid; and moreover it appears from *Jones's* report of the case, and he was one of the Judges before whom the cause was heard, that the Court thought the objection good, but the defendant perceiving that the opinion of the Court was against him on another, which was the grand point in the cause, consented, upon payment of costs, that judgment should be given for the plaintiff. With this

(y) 2 Mau. & Selw. 277, 278.

(z) 1 Ventr. 339; 2 Jo. 110; 2 Show. 67; and see *Earl of Cardigan v. Montague*, App. No. 13; *Doe v. Matthews*, 5 Barn & Adol. 298; 2 New. & Man. 264.

Shower's report agrees; and Jones is there made to say, that "*proinde*" was the most common and general word used in leases for *all* the things demised.

49. In a case like that of How and Whitfield, upon the merits it would not be possible, under any construction, to support the lease. If the reversions of the several estates were afterwards to descend to different persons, there must be an apportionment of the rent, and then sufficient would not be left to satisfy the terms of the power. There appears to be no sound principle upon which it can be contended that the whole rent is reserved in respect only of the land within the power; although a man *may* demise his own lands without any rent, and the Court of K. B. [*419] lately *observed that the case, as reported in Ventris, it should seem cannot be relied upon. (a)

50. The other point arose in the case of Orby v. Mohun (b) but it was unnecessary to decide it. The power was to lease for three lives or twenty-one years, &c.; 1st. Of the lands anciently demised whereof fines had been usually taken, reserving the ancient rents or more; 2d. Of the other lands, reserving the most approved rents that could be got. Two leases were made under the power; one, of the estate not anciently let, at the best improved rents, and the other, of all the lands in the settlement, reserving therefore "*the ancient rents*," and did not specify what those rents were; and supposing the reservation good, considered abstractedly, the question was, whether the lease was not bad, on the ground that it comprised the lands not anciently demised. In support of the lease, it was argued that the rent issuing out of all must be apportioned, and so it would be in nature of several leases in construction of law, because *redendo singula singulis*, the ancient rents shall be construed to be reserved for the lands anciently let; and no rent being reserved for the lands not anciently demised, it is void as to them. But Lord C. J. Trevor expressed a contrary opinion, and placed much weight on the word "therefore" in the reservation. He, however, declined delivering an absolute opinion on the point, as he went upon another reason. (c) Lord Keeper Cowper also thought the lease bad on the ground of the reservation. (d) But Lord Chief Justice Holt maintained strongly the

(a) See 2 Adol. & Ell. 750.

(c) 2 Cha. Rep. 58, 59.

(b) 3 Ch. Rep. 56, *supra*, p. 415.

(d) 3 Cha. Rep. 78, 79.

contrary opinion ; he insisted that the reservation was several ; for that which was *not* anciently demised will not hurt the other, but must fall to the ground ; and the contrary opinion, he said, was contrary to all the rules of law : and as to the word *therefore*, he clearly proved that however joint words are, yet they *shall be taken severally where they have a [*420] distinct subject-matter to work upon.(e)

51. In the case of *Campbell v. Leach*,(f) opened and unopened mines, were demised by one deed, reserving generally a certain proportion of the produce. The Master of the Rolls held that the power did not authorize a demise of the unopened mines, and the lease being of opened and unopened mines, the whole was void. Upon the appeal it was argued not to be like the case where two things are granted which are inseparable, and the one is out of the power, and the other within it : in such case the lease might be void as to both. But here the opened and unopened mines were separate, and the rent reserved was not a gross sum for the whole, but a proportion of the profits of each mine ; and the Court accordingly overruled the objection ; and this of course upon legal and not equitable grounds, for if the lease on this objection had been bad at law, it would have been difficult to support it in equity. The decision upon the appeal was clearly right. The addition of the unopened mines, which were not within the power, could not affect the validity of the demise of the opened mines, for the reservation operated distinctly and separately on them, and was simply inoperative as to the unopened mines. No portion of the rent reserved for the opened mines attached to the unopened mines, nor did the rent require to be apportioned in consequence of the unopened mines not passing by the power.

52. These cases appear to depend upon the nature of the reservation. But there are cases in which one entire rent has been reserved for an estate partly within the power of leasing and partly excepted out of it, or not in the settlement ; so that the lease was incapable of support upon the ground of a distinct reservation in law for the part within the power.

53. This point arose in the great case of the *Earl [*421]

(e) 3 Cha. Rep. 68, 99.

(f) Ambl. 740. Vide supra.

of *Cardigan v. Montague*:(*g*) lands comprised in the power and lands excepted out of it were demised by one lease at an *entire rent*, and the Master reported the lease to be void and not warranted by the power, and the report was acquiesced in. The lease of course was void as to the property not authorized to be leased, and it does not appear whether upon an apportionment a sufficient rent would have remained for the property which was authorized to be demised.

54. In a case before Lord Kenyon at *nisi prius*,(*h*) a rector made a lease under an act of parliament, and the learned Judge said, that if the demise was of lands and an entire rent reserved, and there was any part which could not be legally demised, the whole of the demise was void. The power was to lease at the best rent. The case was decided upon another point.

55. In a recent case, a lease by a tenant in tail of the entailed lands, which could not be sustained, with leasehold lands intermixed, at an entire rent, was held void for the *whole*; for it was said there must be an apportionment, and how could that be done?(*i*) But this clearly could not be maintained, and it has since been overruled, for of course there may be an apportionment for the land not within the power, and therefore the lease as to that is valid.(*j*)

56. But we are now to consider whether there can be an apportionment, so as to sustain the lease as a due execution of the power.

57. The point appears to have arisen in *Coxe v. Day*, where both of the estates were comprised in the settlement.(*k*) The facts appear to be, that a fee-simple estate was settled to uses in strict settlement, with a power of leasing at the „best [*422] rent, and a prebendal lease for lives was *by the same deed vested in trustees upon trusts corresponding with the uses of the fee-simple estate, and a power was given to *the trustees*, at the request of the tenant for life, to make underleases similar to the leases warranted by the first power. A lease was

(*g*) App. No. 13 (3), (5); and see (2).

(*h*) *Doe v. Lloyd*, 3 Esp. Ca. 78.

(*i*) *Rees v. Phillip*, Wightw. 69.

(*j*) *Doe v. Meyler*, 2 Mau. & Selw. 276.

(*k*) 13 East, 118.

granted by a tenant for life of the prebendal property and of the fee-simple lands, at one yearly rent. Upon an ejectment, the lease was avoided as to the prebendal lands, as the legal estate was in the trustees, and not in the tenant for life when he granted the lease. (l) Upon a case subsequently directed by the Court of Chancery, two questions arose, which would impeach the lease altogether as an execution of the power, and the case was decided upon those questions against the validity of the lease generally. But a third question was raised, viz. whether in consequence of the lease of the prebendal part of the demised premises being void at law, the lease was or was not valid as to the freehold part, the rent for the whole being entire; and in case the lease is valid as to the freehold part of the premises, whether the lessee would be liable to pay the whole rent for the same, or to have the rent apportioned. The counsel against the lease, admitted the third point was against him, upon the authority of Co. Litt. 148 b, which does not appear to have been questioned. Lord Coke says, "Concerning the apportionment of rents, there is a difference between a grant and a reservation of a rent; for if a man be seised of two acres of land; of one in fee-simple and of another in tail; and by his deed grant a rent out of both in fee, in tail, for life, &c., and dieth; the land entailed is discharged, and the land in fee-simple remains charged with the whole rent: for, against his own grant, he shall not take advantage of the weakness of his own estate in part. But if he make a gift in tail, a lease for life, or for years, of both acres; the donor or lessor dieth; the issue in tail avoideth the gift or lease; the rent shall be apportioned; for seeing the rent is reserved out of and for the whole land, it is reason *that when part is [*423] evicted by an elder title, the donee or lessee shall not be charged with the whole rent, but that it should be apportioned rateably according to the value of the land, as Littleton here saith."

58. In *Doe v. Meyler*, (m) a lease comprised lands of which the lessor was seised in fee, and lands of which he was tenant for life, with a power of leasing at the ancient rent or more, and an entire

(l) *Doe v. Day*, 10 East, 427.

(m) 2 Mau. & Selw. 276.

rent was reserved for the whole, but the lease *in other respects* was bad as an execution of the power ; so that the only question was, whether the lease was valid as to the principal lands, which was decided in the affirmative, upon the authority of the passage in Co. Litt. before quoted.

59. In a later case Mr. Justice Patterson observed, that in Doe v. Meyler, it might have been that the proper rent was reserved upon the lands comprised in the power ; for Dampier, Justice, observed, that the lands held in fee might have been demised without any rent.(n) But the observation of Dampier, Justice, was made with reference to the opinion which he had expressed at the trial by a recollection of the Lord Mountjoy's case, without adverting, he said, to the distinction that the grant and render of one entire rent in that case tended to destroy the evidence of the ancient rent ; *but that was not so there*, because not any rent was necessary to be reserved for the lands in fee simple. He does not, therefore, appear to have thought that no portion of the rent was to go with the fee-simple lands, but that it was actually a case for an apportionment. Mr. Justice James Park observed, that Doe v. Meyler was analogous to the case of a person leasing at an entire rent lands to which he has title, and others to which he has none ; where, on the lessee being evicted of part by title paramount, the rent may be apportioned.(o)

60. Mr. Justice Park, in delivering his opinion in [*424] *Smith and Doe, in the House of Lords,(p) observed, that in Doe v. Meyler the lease was not executed according to the power, for it added, "and if there be no sufficient distress ;" but the Court held, though the lease was void because not executed according to the power, yet it was good as to the land of which the lessor was seised in fee, and the Court apportioned the rent ; which was an erroneous judgment, if the objection to the lease in Smith and Doe was not a good one. But we may observe that the apportionment of the rent was proper in any view of the case ; for even if the lease had been a good execution of the power, unless the remainder-man and the heir-at-law

(n) See 5 Barn. & Adol. 302; 2 Nev. & Man. 268.

(o) Ibid.

(p) Infra.

or devisee of the lessor had been the same person, it was of necessity that the rent should be apportioned.

61. In the later case of *Doe v. Rendle*,^(q) a power to lease, reserving the ancient rents, was held to extend only to the lands anciently let. A lease was granted under the power of an estate consisting partly of lands anciently let, and partly of lands which had never before been demised, but both were comprised in the settlement. The lease was at one entire rent, viz. the ancient rent payable for the part of the property which had been anciently let. After the death of the lessor, upon which event the lease ceased as far as it comprised the lands not before let, the question was, whether it could be maintained as to the lands within the power. It was contended, that as nothing passed by the instrument as an appointment, except the lands anciently demised, the ancient rent was reserved, and issuing out of those lands only. But the Court, upon the authorities applying to leases under the enabling statutes and *Mountjoy's* case, held that that cannot be deemed the ancient and accustomed rent which is reserved upon lands never let before, as well as upon lands anciently let.

62. We cannot fail to observe, that in this case no apportionment could have made the lease valid under the power, for the ancient rent only was reserved for *all* the "property." [*425] If the lease had been partially valid, the lessee, upon the eviction of the part not well demised, would have been entitled to an apportionment, and could not have been compelled to pay for a part of the property all the rent he agreed to pay for the whole.

63. In the last case in which this point arose,^(r) a lease was granted under a power of land within the power, and also of two fields excepted out of it, at an entire rent. The power required the like rents as were then reserved, or more. The rent reserved by the testator, for the part authorized to be let, was 29*l*. The rent reserved by the lease in question was 40*l*. The Lord Chief Justice simply observed, that *Doe v. Rendle* was a clear authority for the plaintiff, and so the lease was held to be altogether void. But this might require reconsideration.^(s) It was certainly dis-

(q) 3 Mau. & Selw. 99.

(r) *Doe v. Matthews*, 5 Barn. & Adol. 298.

(s) See besides the peculiar form of the reservation.

tinguishable from *Doe v. Rendle*, for the reason before stated. The point in *Doe v. Matthews* came before the Court upon a *case reserved* upon a trial in ejectment, and Mr. Justice James Parke observed, in the course of the argument, that it could not be known from the data in the case what would be the proper portion of rent on either part of the demised property, *the value of the two closes not being given*. In truth, therefore, the Court were precluded by the case from considering the point upon which the validity of the lease *pro tanto* altogether depended.

64. The cases establish this rule, that where, as in *Campbell v. Leach*, a rent is reserved according to the quantity or produce, as the tenth of the produce of every mine, or 40s. an acre, or the like, then, although the demise is joint in terms, and part is not well demised, or not comprised in the power, yet it shall hold good as to the lands within the power, and duly demised; but that where the ancient rent is required, and that part is reserved as an entire rent for the land within the power and [*426] more, the lease is *bad as an execution of the power, not simply because it tends to destroy the evidence of the ancient rent, but because upon an apportionment the ancient rent would not remain for the land anciently let. Where the best rent is required, and the reservation, although of one entire rent for land partly within the power, and partly not subject to it, would upon an apportionment leave sufficient for the settled lands, so as to satisfy the terms of the power, it appears to be still open to maintain that the lease may be supported as a due execution of the power. The inclination of the Courts would probably be to hold that the remainder-man was not bound, on account of the difficulty which such a reservation would impose upon him. But the point has not been considered with the attention which it deserves. There are grounds upon which such a lease might be properly supported, and a contrary resolution would work great injustice against lessees, who frequently have no means of guarding against the introduction of parcels not within the power.

65. If an estate were held in undivided moieties, and the same person were seised in fee of one moiety, and tenant for life, with a power of leasing, of the other, and were to make a lease of the entirety at an entire gross rent, it seems clear, that upon his death, the rent would go according to his several interests in the

land; that is, one moiety with the settled portion of the estate, and the other moiety with the unsettled; and that, if the rent were sufficient in amount, the power would be well executed.

66. In none of the cases hitherto considered was there a distinct reservation of a particular sum in respect of the lands comprised in the power; where there is such a reservation, that constitutes a several demise, and no objection can be raised to the execution of the power.^(t)

67. In powers of leasing it is usual to express that the *rent reserved shall be incident to and go along [*427] with the reversion and inheritance of the estate demised; and in well-drawn leases under powers the rent is accordingly reserved to the tenant for life, and after his decease to the person or persons who shall for the time being be entitled to the reversion and inheritance of the premises under the instrument creating the power. But it is well established, that a reservation to the tenant for life, exercising the power, "his heirs and assigns," is a good reservation; for those words mean of necessity the person to whom the inheritance shall go; the words can have no other meaning.^(u) It is not unusual to reserve rent generally during the term, without saying to whom; and in Whitlock's case it was agreed that this was the most clear and sure way, and the law will make the distribution. However, all the three several ways, viz. to the tenant for life and persons in remainder; to the tenant for life, his heirs and assigns, and generally during the term, are good enough and effectual in law. It was originally argued in Whitlock's case, that even the reservation to such person or persons who shall have the inheritance of the premises, was merely void, for no rent could be reserved but to the lessor, donor or feoffor, and his heirs, who are privies in blood, and not to any who is privy in estate. But it was resolved that the reservation was good; for the lease hath not its essence from the estate of the lessor, which he hath for life, but the lease hath its essence out of the original assurance, and in construction of law precedes the estate for life and all the remainders; for after the lease

(t) For what amounts to a several reservation, see Knight's case, 5 Rep. 54 b; and see Doe v. Rendle, 5 Mau. & Selw. 99.

(u) Whitlock's case, 8 Rep. 69 b; Hotley v. Scot, Lofft, 316, 3 Bligh, 331, n.; and see Dougl. 572; Campbell v. Leach, Ambler. 740.

made, it is as much as if the use had been limited originally to the lessee for the term ; and then the other limitations, in construction of law, follow it. Then when the lessor reserves rent to him and his heirs, it is good ; for that, by construction of law, precedes the limitation of the uses ; and then, it being [*428] well reserved, it is *well transferred to every one to whom any use is limited. So if the reservation be to the lessor, and to every person to whom the inheritance or reversion of the premises shall appertain during the term, that is likewise good ; for the law will distribute it to every one to whom any limitation of the use shall be made : and in such case no rent is reserved to a stranger, for the reservation precedes the limitations of the uses to strangers.

68. In *Berry v. White*,^(x) where the reservation was to the lessor, his heirs and assigns, the lease was not made by the settlor. Bridgman, C. J., observed that the reason held well in *Whitlock's* case, for *Whitlock*, who made the lease, made the settlement ; and therefore, if (as the law makes the construction) the lease was made before the remainders limited, then the rent was well reserved to him, his heirs and assigns, for he had the inheritance at the time of that reservation. But in the case before him, *A.* made the settlement, and *B.*, who was not his heir made the lease ; and therefore such a reservation to *B.*, his heirs and assigns, before the limitation of uses, had been naught. But he held the reservation good, because it was during the continuance of the term ; and he considered the addition of the words, “ to him, his heirs and assigns, as being void in themselves, and not vitiating the reservation, which was good without them. And he held, that if *B.* had reserved the rent to him, his executors and assigns, *during the term*, or to him and his wife *during the term*, or to him *during the term*, the law would have rejected that which is void.

69. In a case^(y) where an estate was settled to the use of a mortgagee for one thousand years, remainder to one for life with remainders over, with a power to the tenant for life to lease for ten years from the date of the deed, or seven years from the day

(x) *Bridg. by Ban.* 103.

(y) *Rogers v. Humphreys*, 4 Adol. & Ell. 299.

of her decease, reserving the best rent, &c. and the tenant for life made a lease under the power for *seven [*429] years from her death, paying the rent to M. R. (the remainder-man in tail) or the person or persons who for the time being should be entitled to the *freehold or inheritance* of the premises immediately expectant on her decease, it was held that the prior mortgagee *for years* was entitled to the rent.

70. The same rule prevails as to any other reservation, *e. g.* heriots, and equally to the persons by whom the render is to be made. Therefore where in a power to lease for years determinable upon lives, the usual reservations were required and the old lease reserved the best good of the lessee, his executors, administrators, or assigns, or such person as shall be in possession of the premises, the power was held to be satisfied by a reservation of the best goods of the person or persons who for the time being shall be tenant or tenants in possession of the same premises. And a reservation in the same case of the best goods of the tenant by name, stopping there, the Court would by no means say was objectionable, for as the payment of these heriots could only be enforced by distress or action, a distress might be made of the best beast of the tenant named, if alive, or should he be dead or have parted with the premises, what was his best beast. (z)

71. So if the ancient reservation of suit to the mill were to the lord of the manor, and in the new lease it is to the owner of the inheritance, that can make no difference. (a)

72. Before closing this action, we may recall to our remembrance the case of *Talbot v. Tipper*, where, as we have seen, under a power "to lease with or without fine, and rendering such rents and services as the donee should think fit," it was determined that no rent whatever need be reserved. (b)

73. In *Audley v. Audley*, the power in a settlement was, *that the husband should have power to make [*430] leases "for a provision of anything he should have, or otherwise as he should direct;" and it seems to have been declared to be for the benefit of the younger children. Lord C.

(z) *Doe v. Lock*, 2 Adol. & Ell. 705.

(a) S. C.

(b) Vide *supra*, vol. 1, p. 522; *Muskerry v. Chinnery*, Lloy. & Goo. t. Sugd. 185; 7 Cl. & Fin. 1; 2 Jebb & Sy. 300; *supra*, vol. 1, p. 523.

J. Hale declared the power good, and that a lease made by force of it to trustees for ninety-nine years, if several of his children should so long live, in trust, reserving as a rent two-thirds of the yearly value, was valid; and it was so decreed in the Court of Chancery.(c)

74. By the 4 Will. 4, c. 22,(d) it is provided that all rents reserved by any lease, granted under any power after the passing of the act, shall be apportioned for the benefit of the personal representatives of any person interested in such rents.

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*SECTION VII.

OF THE COVENANTS AND CONDITIONS TO BE OBSERVED.

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| 1. Reservations and exceptions. | 27. Power to lease for new building, or for rebuilding and repairing: Doe v. Wethers. |
| 2. Exception not a reservation. | 28. Observations thereon. |
| 4. Reasonable time may be allowed for re-entry, although the power is silent. | 30. Where covenant by the lessor to repair, &c. binds the inheritance. |
| 5. } So it may be qualified by lawful de- | 31. Ancient boons required to be reserved, includes covenants. |
| 13. } mand, and no sufficient distress. | 32. And omission of old covenant to pay taxes bad. |
| 6. Coxe v. Day. | 33. Heriots improperly reserved. |
| 7. Lord Jersey's case. | 29. } Improper covenant binding the rever- |
| 11. Coxe v. Day overruled by Lord Jersey's case. | 34. } sion avoids the lease. |
| 17. If no overt distress good. | 35. Void lease not supported because lessee has done what ought to have been required. |
| 18. Period fixed by power may be shortened. | 37. Lessee's covenants enure to remainder-man. |
| 19. Where qualifications are confined to one class of leases. | 38. Although not required by the power. |
| 20. Power to commit waste contrary to prohibition, lease void. | 39. So a power of re-entry. |
| 21. Counterpart. | 40. } And covenants by a lessor run with |
| 22. } What covenants are required where | 41. } the land. |
| 23. } power is silent. | 41. Debt lies against the lessee. |
| 24. Usual covenants required must be inserted. | |
| 26. Covenants to build necessary where building lease is to contain reasonable covenants. | |

1. In considering what is required by a power of leasing, we should bear in mind that rent, heriots, suit of mill, and suit of

(c) 2 Cha. Rep. 82.

(d) Sect. 2 (16 June, 1834.)

court, are, according to the legal sense and meaning of the word, *reservations*. A privilege to the lessor to hawk, hunt, fish or fowl, is not either a reservation or an exception in point of law. A right to the lessor to cut and carry away the timber, or to have the property in it or in mines, is not a reservation, but an exception. (e)

*2. In a case where the ancient rent and reservations [*432] were required, it was held that as there were other legal reservations besides rent, to satisfy the words "rent and reservations," matters which, in point of law, were the subject of exception, could not be deemed a reservation. The Court observed that it might be said, that if the person who creates the power uses the word "reserving" in such a way as to make an exception a reservation, it must be so taken, but they thought not necessarily. Powers in many respects are construed so very strictly, that they must be so throughout. (f) The true rule, no doubt is, that the words must be read in their proper legal sense, unless the creator of the power has imposed a different meaning upon them, which is apparent upon the face of the instrument, in which case, as there is no magic in words, his sense must be adopted. But if the words are unexplained and there is sufficient to satisfy them in their legal sense, they must be confined to that meaning. This was the point decided in *Doe v. Lock*.

3. In the usual power of leasing, besides the reservation of the best rent, it is generally required that the lessee covenant for payment of the rent: that a clause be inserted for re-entry in default of payment: that the lessee be not made dispunishable of waste; and that he execute a counterpart of the lease: and if any of these conditions be not complied with, the lease will be void. ✓

4. It should never be stated *generally* that a clause of re-entry shall be contained in the lease, but it should be expressly stated how many days the rent must be in arrear: the usual period is twenty-one days. A reasonable time may however be inserted in the lease, although the power is general on this head. In the case of *Jones v. Verney* (g) this was done, and no objection

(e) *Doe v. Lock*, 2 Adol. & Ell. 705.

(f) *Doe v. Lock*, 2 Adol. & Ell. 705.

(g) *Willes*, 169. See *Higgins v. Lord Rosse*, 3 Bligh, 112; *Rutland v. Doe*, 5 Mees. & Wels. 694.

[*433] appears to have been made *on that ground, although the case was much considered; and it is now a settled point that a reasonable time may be allowed, and the law will take notice of what is a reasonable period. (*h*)

5. In the case of *Hotley v. Scot.*(*i*) the power required the insertion in the leases of a clause of re-entry on non-payment of the rent for twenty-one days. A lease was made with a power of re-entry in case the rent should be behind for twenty-one days, *having been lawfully demanded*,(*k*) or no sufficient distress. There the power prescribed the time, and that was followed by the lease, but the qualifications above mentioned were added, although the power was silent in that respect. In support of the lease, it was argued that nothing was added but what came in by force of law, or followed upon a deficiency of the vague and not sufficiently explicit words of the power. Is not rent, it was asked, always to be demanded before a distress becomes liable, or a forfeiture incurred? And as to the other, if there be a sufficient distress, what then? The rent will be recovered without re-entry; and, neither in reason, equity, or conscience, could there be any other intent of the original power. And Lord Mansfield said, that as to demand, a clause of re-entry was required as a security for the rent: demand is requisite both by common law and statute: a clause of re-entry will never be allowed to operate further than as a security for rent. A re-entry is to enforce the payment of rent; it is an immediate forfeiture of the estate by common law: by statute it cannot be without a want of distress. According to another report he said, the clause of re-entry [in the *power*] is short, with words of course, and does not preclude the operation of law. The effect of this decision is, that if the remainder-man should re-enter for non-payment *of rent, he might be turned round, unless he had searched every corner for a sufficient distress. (*l*) Such a condition, therefore, is a serious restraint upon him, but it is similar to that prescribed by the 4 Geo. 2, c. 28.

(*h*) Cases *infra*.

(*i*) *Lofft*, 316; *nom.* *Lord Tankerville v. Wingfield*, 2 Brod. & Bing. 498; *S. C.* 7 Price, 343; 3 Bligh, 331 n.; and 5 Moore, 346 n.

(*k*) *Qu.* see the reports.

(*l*) See *Rees v. King*, *For. Excheq. Rep.* 19.

6. In the later case of *Coxe v. Day*,^(m) the power of leasing required the best rent, and that there should be contained a condition of re-entry for non-payment of the rent by the space of twenty-one days. A lease granted under the power contained a power of re-entry, if the rent should be twenty days in arrear, being lawfully demanded, and no sufficient distress, so that the case was in no respect distinguishable from that of *Hotley and Scot*. That case, however, was not cited, and the Court of King's Bench were of opinion that the power of re-entry was not warranted by the power, and that the lease was void on that ground.

7. In the still later case of *Doe v. Smith*,⁽ⁿ⁾ in a strict settlement, there was a power of leasing such parts of the estates as were then leased for life or lives, or for years determinable on the dropping of a life or lives, to any person or persons in possession or reversion for one, two, or three lives, or for any number of years determinable on the dropping of one, two, or three lives, at the ancient and accustomed yearly rents, duties, &c., or more, or as great, or beneficial rents, duties, &c.,^(o) as then were, or at the time of demising should be reserved;" and then follows the clause, "And so as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved." This power related only to lands then let for lives, or for years determinable on lives. There was another power "To demise all the estates for any term absolute, not *exceed- [*435] ing twenty-one years, in possession, &c., at as much or as great and beneficial yearly and other rents as then were paid, or the best and most improved yearly rent, &c., and so as in every such lease for any term of years absolute respectively, there be contained a clause of re-entry, in case the rent or rents thereupon to be reserved be behind or unpaid by the space of twenty-eight days after the time thereby respectively appointed for payment thereof." Mr. Vernon was tenant for life, and the premises in question had been formerly let for years determinable on lives; and he made a lease, which contained a *power of re-entry*, "if it

(m) *Coxe v. Day*, 13 East, 118. See *Doe v. Meyler*, 2 Mau. & Selw. 276; and 2 Brod. & Bing. 530. 539.

(n) 1 Brod. & Bing. 97, 2d vol. 473; 7 Price, 281; 5 Mau. & Selw. 467; 3 Moore, 339; 5 Moore, 332; 3 Bligh, 290.

(o) See Lord Eldon's opinion on these words, 2 Brod. & Bing. 607; and see p. 587, *ib*.

shall happen that the rent of 2*l.*, and every or any of the duties, services, &c. shall be behind or unpaid, in part or in all, by *the space of fifteen days* next over or after the times whereat or wherein the same ought to be paid, &c., *and no sufficient distress or distresses can or may be had and taken upon the said premises, whereby the same, and all arrearages thereof (if any be) may be fully raised, levied, and paid.*" And the lease closed with a general clause, that if any default shall be made in the payment or performance of all or any of the reservations, covenants, or agreements before contained, it shall be lawful for the lessors, their heirs or assigns, to re-enter.(I) The rent, duties, reservations and payments, were the ancient and accustomed, and the usual and accustomed form of leases of the estate contained in the said marriage settlement for lives or years determinable on lives, as well prior as subsequent to that settlement, was, with a conditional proviso of re-entry similar to that in the said indenture of lease.

9. Now the distinction between this case and the preceding cases was, that although here in one power, as in the other cases, the number of days which the rent was required to be [*436] in arrear in order to give a right of re-entry *was stated, and the power was silent as to a want of sufficient distress, yet the power upon which the question arose simply required a power of re-entry for non-payment of rent, without saying more; and the variance between the two powers in the same settlement raised a considerable argument. It was held in the King's Bench by Lord Ellenborough and Mr. Justice Bayley, (*p*) who had concurred in the decision in *Coxe v. Day*, that the lease was authorized by the power. It was silent as to the time it should be carried into effect, and being so silent, why, they asked, should it not, in virtue of such silence, be intended that the creator of the power thought it enough to require that there should be some reasonable power of re-entry for non-payment of rent upon every lease, leaving it to the discretion of the person by whom it should be granted to prescribe when and under what circumstances that power of re-entry should in each particular case be enforced? And they thought that the discretion, which, upon

(*p*) *Doe v. Smith*, 5 Mau. & Selw. 467.

(I) Upon this clause no reliance was placed by either party.

such construction, was necessarily left to the person who was the object of the power, had been well exercised.

10. In the Court of Exchequer Chamber, Garrow, B., Wood, B., and Graham, B., were of opinion with the decision in the King's Bench; but Burrough, J., Park, J., Richards, C. B., and Dallas, C. J., were of a contrary opinion. Each side relied on the lease for twenty-one years being required to be made with a clause of re-entry in case the rent should be behind twenty-eight days. On the one hand it was used as evidence that the term in the first power was left to the discretion of the donee; on the other, that the power of re-entry under the first clause was to be immediate. The judgment in the Exchequer Chamber was reversed upon appeal to the House of Lords; Richardson, J., Burrough, J., Holroyd, J., Park, J., *Dallas, C. J., [*437] were against the validity of the lease; and Best, J., Garrow, B., Bayley, J., Wood, B., Graham, B., Richards, C. B., (who had changed his opinion,) Abbott, C. J., the Lord Chancellor, and Lord Redesdale, were in favour of its validity. (q)

11. In the discussion of this case in the Exchequer Chamber, and in the House of Lords, the cases of Hotley and Scot, and Coxe and Day, were minutely examined. Mr. Justice Bayley, the surviving Judge before whom Coxe and Day was decided, supported his opinion in Doe and Smith in the House of Lords, and stated that the opinion would not trench on Coxe v. Day, on the ground, no doubt, that as the power prescribed a particular form of re-entry, no other qualification could be annexed. It was agreed by nearly all the Judges that Hotley and Scot, and Coxe and Day were opposed to each other. Most of the Judges who opposed the validity of the lease in Doe v. Smith relied upon Coxe v. Day as an authority, and considering that case as not distinguishable from the one before them, they preferred the decision in Coxe v. Day. The Judges in favour of the validity of the lease generally treated Coxe v. Day as not well decided, although some referred to the distinction between the powers in the two cases. Lord Eldon, C., treated Hotley and Scot as opposed to Coxe and Day, and the judgment of Lord Ellenborough, and Bayley, J., in Doe v. Smith, as conflicting with Coxe v. Day.

(q) 7 Price, 281; 2 Brod. & Bing. 473; 3 Bligh, 290; and see Doe v. Wilson, 5 Barn. & Ald. 363; Bowes v. E. L. Water Works, Jacob, 330.

Richards, C. B., stated in the House of Lords, that his opinion had always been for extension of time, but that he had originally held the lease bad, because of the clause "if no sufficient distress." Lord Eldon, with reference to the old leases and the terms of the power, observed, that he could not help expressing that he entertained very considerable doubt whether if this clause *as to the distress* had *not* been contained in the new lease, the new lease for that reason would not have been bad.

12. The result appears to be that *Coxe v. Day* is over-
[*438] ruled, *and that where the power is silent as to time and conditions, as in *Doe and Smith*, a reasonable time and circumstances may be introduced into the clause of re-entry—as in that case fifteen days, and no sufficient distress—or as in a later case forty-two days(*r*)—and that if the power expresses the time, although that prevents further time from being allowed, yet a reasonable qualification may be introduced into the clause of re-entry, *e. g.* a want of sufficient distress, as in *Hotley and Scot*.

13. In a later case it was decided that under such a power as that in *Doe v. Smith*, not only may a reasonable time be allowed—*e. g.* twenty-eight days, which was the period allowed in an old lease—but that it is no objection to a lease under the clause of re-entry on non-payment of the rent is qualified by the words "being lawfully demanded." These words were found in the case of *Coxe v. Day*, and perhaps in *Hotley and Scot*. No objection appears to have been made to the introduction of that qualification in *Coxe v. Day*.

14. In the case to which I refer it was also decided that a qualified power to distrain, which had been contained in old leases, and which did not take away the landlord's common-law right, did not vitiate the lease. The case is *Doe v. Wilson*,(*s*) where the power in a private act of parliament required the usual rents, &c., and that in every lease there should be contained a condition of re-entry for non-payment of the rent: the lease granted under the power contained a power of distress if the rent should not be paid at the days and times aforesaid, or if the said amerciaments,

(*r*) *Doe v. Rutland*, 2 Mees. & Wels. 661.

(*s*) 5 Barn. & Ald. 363. See 2 Brod. & Bing. 504.

pains, fines, and penalties, *nomine pænæ*, after reasonable demand in that respect made, should not be paid and satisfied, and a power of re-entry in case the rent shall be behind or unpaid by the space of twenty-eight days, *being lawfully demanded*. In a lease, granted before the act, there *was a [*439] power of re-entry upon the rent being behind for twenty-eight days, upon its being lawfully demanded, and no sufficient distress found upon the premises, and there was a power to distrain, similar to that in the lease granted under the power. The Court in giving judgment said that two objections were made to this lease. The first objection was, that the clause enabling the landlord to distrain was a restriction upon him, and injurious to the remainder-man; for it is said that under this power he cannot distrain without making a demand, and when he has made the distress, that he cannot sell. Now, if this objection avoid the lease, it must do so, not by reason of its contravening any particular contained in the leasing power, but by reason of its being contrary to its general nature and object, which is, that there should be a lease at a yearly rent, with the usual and beneficial modes of enforcing payment. It is to be observed, that the clause itself refers, not merely to the payment of the rent of 50*l.*; but to payments in *nomine pænæ*; the words are, “If it shall happen the said yearly rent or sum of 50*l.* shall not be paid at the days and times aforesaid, or if the said amerciaments, pains, fines and penalties, in *nomine pænæ*, after reasonable demand, be not paid, then the lessor may distrain.” It appears, however, that this clause was copied from a lease of 1708, and they ought to pause before they held that such a clause, copied from the former lease (and which the party who prepared the instrument after the act of parliament probably had before him,) vitiates this lease. The Court could not think, however, that the landlord was abridged by this clause of any remedy for the recovery of his rent which he otherwise would have had. Independently of this clause, the landlord had a power to distrain and a power to sell under the distress. And they could not give such an effect to the language of this clause as to say that it was intended to deprive the landlord of any power which he had by the common and statute law. The true construction of it *appeared to be to con- [*440] sider it as introduced in furtherance of the power under

the common law ; and they thought that they could not give it the construction contended for, unless they saw clearly that the landlord at the time of granting it intended to take away the power under the common law.

15. The second objection was as to the right of re-entry. It was said this was to be only at the end of twenty-eight days after the rent was in arrear, and the same " being lawfully demanded." Now as to the right of re-entry not accruing till the expiration of a given number of days, the case of *Doe v. Smith* was directly in point. It was there decided that the words contained in this power, " so that there be conditions of re-entry for non-payment of rent," are to be interpreted to mean a usual or reasonable condition of re-entry ; and if that be so, it appears from the lease of 1708 that twenty-eight days are there given for the payment of the rent before the landlord can re-enter ; with this additional clause in favour of the tenant, that if there be no sufficient distress upon the premises the landlord may then re-enter.

16. Another objection was, that by the terms of this lease the landlord was " to re-enter on the rents being lawfully demanded ;" and it was said that this puts the landlord to the necessity of making the demand, notwithstanding the statute 4 Geo. 2, c. 28, which was made generally for the purpose of relieving the landlord from the necessity of making that demand. In *Doe dem. Schofield v. Alexander* three of the judges of this Court, Lord Ellenborough, C. J., rather doubting than dissenting, decided, that notwithstanding the words " lawfully demanded" in a lease, the landlord has a right to the benefit of the statute of 4 Geo. 2. c. 28, and may re-enter. The Court were of that opinion. By the common law the landlord never could re-enter without making a demand. Every clause of re-entry, therefore, contained the words lawfully demanded" in effect though not in terms, and

therefore in the lease of 1708 those words were quite [*441] *nugatory ; they were probably copied inadvertently into the subsequent leases without considering their effect. They were of opinion that such a proviso for re-entry, which was originally introduced for the benefit of the landlord, ought not to be construed in consequence of the introduction of those words (which were nugatory in the former leases) to deprive the landlord of the benefit intended to be conferred upon

him by the statute 4 Geo. 2, c. 28. The case might have been otherwise if the lease had contained an express covenant that he would not re-enter without demand, or that having entered, he would not sell.

17. And although the like conditions, &c. as in the old leases are required and the re-entry there was if the rent were twenty-one days in arrear and no sufficient *overt* distress, yet a power of re-entry if the rent were in arrear and no sufficient distress will be valid. The law, it was said, recognises a difference between a pound overt and a pound covert, but as to a distress the law does not fix any meaning to the word overt. Is overt to be confined to what may be seen by walking over the lands and farm-yard without going into any inclosed buildings; or does it extend to what may be seen by opening the outer doors of a house or other buildings: or what may be seen by opening inner doors: or by opening cupboards, chests, and boxes, which are not concealed and have no locks; or various other shades being less overt? So many opinions might be formed about the extent of the meaning of the word, that the court could not attribute any legal meaning to it.(t)

18. Where a period is specified in the power for the re-entry, although it cannot be exceeded, yet it may be restricted. In *Coxe v. Day*, the power stated twenty-one days in arrear, the clause of re-entry stipulated for twenty days, but no objection to the lease was made upon this ground; (u) and in the late case of *Doe v. Lock*, it was held *that the provision [*442] was more beneficial to the remainderman, and therefore valid.(x)

19. In *Doe v. Colman*(y) a power of leasing was given by will to demise the estates devised in manner following; viz. such parts of the said premises as had been usually granted or demised, and were then in lease for any term of years determinable upon lives, to any persons for the like terms, and in like manner, and under the like rents, services and conditions as the same had been usually granted: and the residue of the same premises unto any persons

(t) *Doe v. Lock*, 2 Adol. & Ell. 705.

(u) 13 East, 118.

(x) 2 Adol. & Ell. 705.

(y) 1 Bing. 28, and 7 Moore, 271.

for any term of years, not exceeding twenty-one years, in possession, at the best and most improved rent that could be reasonably gotten for the same, so as that no *such* demise or lease should be made dispunishable of waste, nor without a condition of re-entry on non-payment of the rent or services thereby reserved, and so as each lessee should execute a counterpart of his or her lease; and it was held that the word *such* in the will was confined to the latter class of leases, and could not be thrown back to the class first described.

20. If, contrary to the clause, that the lessee be not made dispunishable of waste, he be empowered to work unopened mines, (z) fell trees, or do any other act which amounts to waste, the lease will be void, unless indeed in the case of a building lease, where it should seem the clause would be deemed repugnant to the power itself, and the lessee might pull down old buildings, &c. in order to erect new ones: (a) and the general nature of the power may be such, where there is no restraint upon waste, as to authorize the donee to make the lessee dispunishable of waste. (b)

21. Where a counterpart is required to be executed, the lessee should obtain a memorandum of its execution and [*443] *delivery to the lessor, to be endorsed on the *lease*, and signed by the lessor, for the counterpart itself is of course delivered to the lessor, and if it should be lost or suppressed, the lessee would be in danger of losing the estate unless he could prove the execution of it. Besides, without this precaution, a purchaser from the lessee cannot be satisfied that the power was duly executed, for the lessor may refuse to discover whether a counterpart was executed. The execution of the counterpart need not, of course, be contemporaneous with the lease, (c) but still it must be executed within a period which may fairly be considered as comprehended in the transaction.

22. In the case of *Taylor v. Horde*, (d) where the power required the best rent to be reserved, payable during the term, *but*

(z) *Campbell v. Leach*, Ambler, 740.

(a) See *Jones v. Verney*, Willes, 169.

(b) *Muskerry v. Chinnery*, Lloyd & Goo. temp. Sugd. 185, App. No. 18 supra. *Sheehy v. Muskerry*, 7 Cl. & Fin. 1; *Muskerry v. Sheehy*, 2 Jebb & Sym. 300.

(c) *Fryer v. Combs*, 11 Adol. & Ell. 403.

(d) 1 Burr. 60.

was silent as to any covenant for payment of rent, clause of re-entry, or counterpart, and a lease was executed in which none of these things were observed, Lord Mansfield considered the lease void, because it was merely nominal, and not executed by the lessees; but he proceeded to consider the effect of the omission. He said, that (e) as to the rent reserved, the power requires "the best rent that can be reasonably got, to be reserved payable during the term." There is no covenant for payment. Under a mere reservation it could not be payable till entry; and therefore in fact might never be payable during the term. As to the remedy, there being no covenant to pay the rent, the lease might be assigned to a succession of beggars. There being no clause of re-entry, the ground might lie unoccupied without any or not sufficient distress upon it, so that the remainder-man could neither have his rent nor his land. There is no counterpart; an unusual omission, and very prejudicial. *Therefore the lease could not have been supported if it had been executed by the lessees,* which is not the case. Every fraudulent unfair execution of such a power, in respect of those in remainder, is void at law.

*23. But where the power does not require any par- [*444] ticular covenants to be contained in the lease, the question must be, not whether a particular covenant is omitted, but whether, as Lord Mansfield means to put the case, the lease is a fraudulent, unfair execution of the power. The common form only states the term, and requires the intended rent, and prohibits the lessee from being made punishable of waste, but is equally silent as to the covenant as the power was in *Taylor v. Horde*; and yet leases with very different covenants, although under similar powers, if fairly made, have in all times been supported. Where the ancient or accustomed rent is required, we have already seen that it is no objection to a lease under the power, and it does not contain the same covenants as were inserted in the former leases, as they are upon the whole equally beneficial as the former. To impeach the lease, the ground must be, that the new covenants are a *fraud on the power*, by lessening the value of the reservation. (f)

(e) 1 Burr. 125.

(f) Goodtitle v. Funucan, Dougl. 565. See *Earl of Cardigan v. Montagu*, App. No. 13.

24. Sometimes a power expressly requires the leases to contain usual, or usual and reasonable covenants, or the like. Where the usual covenants are required, unless the covenants contained in the former leases are inserted in the new leases they cannot be sustained; as, where covenants to repair; to grind corn at the lessor's mill; not to cut or fell coppices, and underwoods; not to put any cattle into the coppices, and the like were contained in the old leases, but not in the new ones granted under a power requiring (as it was held) the accustomed covenants to be entered into, the new leases were deemed invalid on the ground that these covenants did, in their nature, tend to the preservation, management, and improvement of the premises demised, and were, for that reason, for the benefit, advantage, and security, not only of the immediate lessor, but likewise of all persons claiming after him.(g)

[*445] *25. In Lord Cardigan and Montagu one power was to lease certain iron-works mentioned in a certain deed, (by which they were agreed to be demised by the author of the power) for such term, *and under such rents, covenants, and agreements* as were therein contained, or to any person from time to time, for any term not exceeding, &c., and so as upon every such lease there be reserved such *rents or payments*, or more, as by the said deed was mentioned and agreed to be reserved. The lease granted under the power reserved the proper rents and payments, but in the deed referred there were important covenants on the part of the lessee for repairing, &c.; and no such covenant on the part of the lessee were contained in the new lease, which was therefore held void. The framer of the lease must have considered that a further lease required only the rents stipulated by the power, and not the covenants as they were repeated in the *so as*, &c.; but this notice was properly overruled, although the power was inaccurately expressed.(h)

26. In *Jones v. Verney*,(i) a power to grant building leases required the leases to contain "the usual and reasonable covenants." A lease was made, and the lessee covenanted to keep the old messuage and buildings on the land in repair, and to *repair such*

(g) *Earl of Cardigan v. Nontagu*, App. 13 (4) (7) (8).

(h) App. No. 13.

(i) *Willes*, 169.

other messuages or buildings as should, during the term, be built on the premises. The Court, upon the whole, thought that this was not a *building* lease under the power; and Lord Chief Justice Willes said that “*a reasonable* covenant in a building-lease must certainly be meant of a covenant to build; but there was none such in this lease.”

27. In *Doe v. Withers*,^(k) there was a power to demise “for the purpose of new building or effectually rebuilding or repairing,” any messuage, houses, out houses, edifices, or buildings, then standing and being, or thereafter to stand *and be, upon [*446] the estate, at as much rent as could be obtained without a fine. There was another power of leasing at rack-rent for twenty-one years, with usual covenants. There was an authority to a trustee to enter and repair, if any tenant for life neglected to keep the estate in good and substantial repair. A lease was made under the first power, and the lessee covenanted that he would before a day named, expend in, about and upon the premises 250*l.*, at least, for the purpose of effectually repairing the said demised messuages and premises, and putting the same and every part thereof into complete and substantial repair, to the good liking of the lessor and his assigns, &c., or their surveyor; and when the same should be so well and effectually repaired as aforesaid, would sufficiently repair the same during the term. It was held that the lease was not warranted by the power. There were two objections; 1. That the power authorized only a lease for new building or rebuilding as well as repairing, and that this was a mere repairing lease: 2. That if a mere repairing lease would be valid, yet the power required it to be for effectually repairing, and the covenant was limited to an expenditure of 250*l.* Lord Tenterden, C. J., observed that the conditions had not in substance been complied with. “Effectually rebuilding and repairing” must mean something more than “effectually repairing.” The first might be understood to signify repairing those parts which merely needed repair, so that they might stand the remainder of the term, and rebuilding those which were not otherwise repairable; the other might imply merely putting the whole into the best state which its then condition allowed of. He also thought that the stipulation

(k) 2 Barn. & Adol. 896.

introduced into this lease was not equivalent to a general covenant effectually to repair ; for under that agreement it would be enough if the tenant laid out 250*l.* upon the premises to the best advantage, whether that sum were sufficient for effectually repairing them or not. This lease, therefore, was not answerable [*447] to the only object for which the tenant for life was authorized to grant it. Mr. Justice Parke concurred on the first point, but as to the second question, said that if the decision had necessarily turned upon that, he should have thought it desirable to ascertain whether 250*l.* was sufficient for effectual repairing, because, assuming that the power only required a demise of the premises for the purpose of a *bona fide* repair, then if 250*l.* were adequate to that purpose, he was not clear that the power would not have been sufficiently well pursued. But it was immaterial to decide that, the lease being invalid on the other ground. Mr. Justice Taunton also concurred on the first point, which he thought corroborated by the power to lease for twenty-one years, where the condition was only that the lease contain the usual covenants. In those leases, the tenant merely covenants to repair. Now if the testator meant to require nothing more than this in the leases for sixty-one years, there was no difference as to the extent of obligation imposed between the power to demise for sixty-one and that for twenty-one years, and it did not appear why there should have been distinct powers for the two terms. Upon the second point he expressed some doubt. By the terms of this lease the minimum to be laid out was 250*l.*, and that was said to be for the purpose of effectually repairing the premises, and putting every part of them into complete and substantial repair, to the satisfaction of the lessor and his assigns. The lease then went on to require, that when the premises, and every part thereof, should be “ so well and effectually repaired as aforesaid,” the lessee should at all times sufficiently repair them ; so that the deed in the first place assumed an obligation on the tenant effectually to repair, and then imposed on him the charge of keeping in repair. Whether that amounted in substance to a covenant effectually to repair (if that alone were required,) it was not necessary to decide, because there is a complete objection to the lease upon the distinction between “ repairing” and “ rebuild. [*448] ing and repairing.” Mr. J. Patterson concurred *on

the first point; on the second point he said he entertained a stronger opinion than Mr. Justice Taunton, for whatever construction might be given to the covenant to lay out 250*l.*, he thought the remainder-man was entitled to the benefit of a covenant which should leave no doubt as to the extent of the lessee's obligation. There should have been an absolute covenant to put the premises into effectual repair.

28. This construction prevented the tenant for life from granting what is properly understood by a repairing lease, the liability under which is altogether different from the common liability of a lessee to repair under a usual covenant in a lease at rack-rent. There appears to be a great reason to suppose, from the expressions, that the testator intended to authorize such a lease as was granted: "To new build, or to rebuild and repair." But suppose rebuilding not to be required, and yet extensive repair to be necessary, so as to render a lease at rack-rent impossible? An extensive repair, under a repairing lease, may be more expensive than a rebuilding. If the *and* had been read *or*, the intention would have been effected: 1, for the purpose of new building, or 2, of effectually rebuilding *or* repairing. Under such a power a lease might have been granted for the purpose of new building altogether, or for the purpose of rebuilding and repairing, or for repairing merely, if no rebuilding was necessary; but still it would have been a question, whether a lease for repairing was *bona fide*, and would effectually restore the property. The nature of such a lease is well understood. If this view is incapable of support, yet it may deserve reconsideration, whether such a covenant in such a lease would not, to the extent of the obligation, impose a liability on the lessee to rebuild any portion which appeared to require it in the course of the repairs. In most cases of extensive repairs, some of them are of the character of a rebuilding.

Upon the second point, the case reserved upon the trial of the ejectment was defective. It ought to have stated "whether the 250*l.* was sufficient for the complete resto- [*449] ration of the premises. If that fact had been found, it would have been difficult to invalidate the lease upon this ground.

29. In the case of *Doe v. Sandham*, (*l*) usual and reasonable

(*l*) 1 Term Rep. 705, *supra*, p. 133; and see 12 East, 309.

covenants were also required, and in the lease the lessor covenanted that in case of fire, &c., he, or the person for the time being entitled to the freehold, should rebuild, or in default thereof, the tenant might quit the premises, and be discharged from payment of the rent. The jury found the covenant to be *an unusual and unheard-of covenant* on the part of the lessor, and the lease was accordingly determined to be void both at law and in equity.

30. But although a power prohibit a lessee from being exempted from punishment for waste, and require all such conditions, covenants and restrictions as are generally inserted in leases according to the usage of the country, yet if the best rent is reserved, and the covenants are the usual ones, a covenant by the lessor to do part of the repairs, which covenant was not prohibited by the lease, and in case of neglect, a power to the lessee to do them, and deduct the expense out of the rent, that is, to set off one demand against the other, is valid; and does not affect the validity of the lease; (*m*) which *gives* no authority to commit waste.

31. The construction is the same upon any word tantamount to the word "covenants," as "boons," or the like. This was decided in the case of the Earl of Cardigan v. Montagu. (*n*) The words in the power were "reserving ancient, usual and accustomed rents, *boons*, heriots and services." And it was determined that the covenants formerly entered into were boons, and that therefore leases granted under the power, in which [*450] the usual covenants, viz., *to repair, to expend the manure on the premises, not to demise or assign, were omitted, could not be supported, although the Master had found they were valid, as the ancient, usual, and accustomed rents, *boons*, and services, were severally reserved. His opinion therefore was, that covenants were not boons within the terms of the power, although he thought covenants for grinding at the lessor's mill were in the nature of boons and services. The principle Lord Chancellor Hardwicke rested upon, was, that the estate must come to the remainder-man in as beneficial a manner as ancient owners held it.

(*m*) Doe v. Bettison, 12 East, 305; *supra*, p. 398.

(*n*) App. No. 13.

32. In the same case it appeared that in some of the old leases there were covenants by the lessees to pay all the taxes and rates which were not contained in the new leases. The Master reported, that as the ancient rents under the old leases did by means of the covenants for the tenants, paying the taxes and rates become clear rents, and for want of such covenants, the several rents reserved by the new leases must be liable to the land-tax, and other taxes and rates, to the prejudice of the remainder-men; he submitted to the Court how far such rents so nominally reserved by the new leases, for want of such covenants could be deemed in substance the same ancient rents, which seemed to be expressly required by the power. The Court held all these leases not to be warranted by the power, and therefore void.

33. A power required the old rent and heriot to be reserved, or more: the old reservation was at the option of the landlord, the three best beasts or a sum of money on the death of each of the *cestuis que vie*, contingent on their surviving each other: the new reservation was of the money only, giving no option, but payable on the death of each life, subject to no other contingency. This was held to be a bad reservation, and that it lay on the lessee to show that the reservation was valid as being more than the old one, which he failed to do to the satisfaction of the jury.(o)

*34. The omission of a proper covenant avoids, we have [*451] seen, the whole lease. In Doe and Sandham,(p) it was argued that the introduction of an improper covenant, although it imported to bind the freehold, was merely void, and ought not to affect the validity of the lease; but Mr. Justice Buller observed, that this argument, if it proved any thing, proved this, that no lease executed under a power could be bad except from the omission of some covenant required; because each covenant which is contrary to that power might be rejected; but that would be contrary to all the adjudged cases on the subject. The lease must be taken, good or bad, on the face of it. Now where the lease on the face of it imports to bind the reversion as well as the tenant for life, inasmuch as the tenant for life has exceeded his power, the lease cannot bind the reversion, and is therefore void. But a

(o) Doe v. Grazebrook, 4 Adol. & Ell. N. S. 406.

(p) Vide supra, p. 449.

covenant by the tenant for life, not warranted by the power but binding himself only, may not avoid the lease.(q)

35. If a proper covenant be omitted, the lease cannot be supported, because the lessee has, of his own accord, done that which he ought to have covenanted to do : *quod initio non valet, tractu temporis non convalescet* ; therefore, if a covenant to build be wrongfully omitted, it is no argument in favor of the lease, that the lessee has actually covered the estate with buildings.(r)

36. Where usual covenants are required, they must be expressly inserted : a lease, with a clause in the very words of the deed, would not be good, nor could it be aided by any special verdict, finding what the usual covenants are.(s)

37. It remains only to observe, that the covenants entered into by the lessee with the donee of the power, his heirs and assigns, will, under the statute of Henry the 8th, enure to [452] *the remainder-man, who may maintain an action on them.(t) This was decided in *Isherwood v. Oldknow*, where the lease was made by a tenant for life under a devise to uses, and the lessee covenanted with the lessor, his heirs and assigns. The remainder-man was considered to be an assignee within the meaning of the statute. He was not the assignee of the tenant for life, the hand which executed the lease, but he was an assignee of *the estate* out of which the lease proceeded, according to the doctrine in *Whitlock's case*, which shows that a lease to be made by tenant for life by virtue of a power, entirely originates and takes its essence out of the estate from which the power is derived, and enures as a limitation of the use in pursuance of it. Then it followed that the covenants made by the lessee are to pass to every person to whom the person creating the power has given any subsequent interest. They pass to the first tenant for life, then to the second tenant for life, although he has an interest derived not from the first tenant for life, but from the person creating the power, and that person is, in the eye of the law, the lessor.

(q) *Doe v. Bettison*, *supra*, p. 398.

(r) *Jones v. Verney*, Willes, 169; and see *Cooper v. Denne*, 4 Bro. C. C. 80

(s) See 3 Cha. Rep. 76.

(t) 3 Mau. & Selw. 382; S. C. MS.; *Machel. v. Dunton*, 2 Leo. 33.

38. Lord Redesdale(*u*) has observed, that in the case of an actual lease made under a power containing covenants on the part of the tenant, the lease being a lien on the lands by virtue of the power, the remainder-man has the benefit of all the covenants, because they are part of a contract which creates a lien on the lands; yet they are mere contracts. They are no part of the demise under the power, but stipulations entered into by the tenant for life with the lessee, for the benefit of the remainder-man: as for instance, in the case of a covenant on the part of the tenant to repair, *supposing it a covenant not required by the power*. The meaning of this passage is, that although the covenant is not required by the power, it will enure to the remainder-man. *In the case before him, the lessee [*453] covenanted to lay out 200*l.* in improvements, which was not required by the power; and he held that if the lessor had died, the remainder-man might unquestionably enforce it as a covenant going with the land.

39. And upon like grounds a power of re-entry, although reserved to the lessor the tenant for life, his heirs and assigns, will enure to the benefit of the remainder-man entitled under the settlement.(*x*)

40. So upon the same foundation, it is apprehended that covenants entered into by a lessor exercising a power of leasing, will, if authorized by the power, run with the land, and bind the remainder-man.

41. In *Goodtitle v. Funucan*,(*y*) where the power was held to be duly executed, the lessor covenanted for himself, his heirs, executors, administrators and assigns, to free the lessee from tithes and from church rates. On behalf of the lessee, it was insisted that if the stipulation were not authorized by the power, *that* covenant would not bind those in remainder. It was a covenant by the lessor for himself, his heirs, executors, administrators and assigns. But the counsel for the remainder-man said, he thought the remainder-man, or the heir or executor, might be sued on the covenant, at the option of the lessee; but Buller, J., said that he thought otherwise; that the lessee had all he had bar-

(*u*) 1 Sch. & Lef. 64.

(*x*) *Hotley v. Scot*, Lofft, 316; Dougl. 572.

(*y*) Dougl. 565.

gained for by his remedy against the representatives of the lessor, and had agreed *by the terms of the covenant*, that it should not run with the land. But Ashurst, J., seemed to doubt as to this, and mentioned Sir John Astley's leases, where the Court had decided that the remainder-man should have the benefit of covenants for rent; though by the words, the lessee covenanted only with the lessor, *his heirs and assigns*. Lord Mansfield, in delivering judgment, said, that as to the church-dues, the covenant seemed to be collateral, and not to go with the land, [454] nor to bind the remainder-man, *resembling a covenant for quiet enjoyment. *But if it did go with the land*, there was no pretence under the circumstances, of fraud on the power. It appeared that no tithe was payable. It seems, therefore, that the general opinion was, that such covenants would run with the land, if such was the intention, and they were authorized by the power.

42. In *Isherwood v. Oldknow*, (z) where it was held that the covenants of the lessee could be enforced by the devisee in remainder under the will by which the power was created, on the ground that the devisor was in the eye of the law the lessor, it was urged as an argument against this mode of considering the case, that the lessee could not maintain covenant against *the heirs* [not the devisees] of the devisor; to which Le Blanc, J., answered, that he did not think that it was necessary that all the remedies should be mutual as between the assignee of the lessor and the lessee, because mutuality was not so much an object of the statute of Henry, as to give those persons who at common law were strangers, a power to enforce covenants which they had not before.

43. The remainder-man may maintain debt against the lessee. (a) This was relied upon in the foregoing case, in the argument in favour of the remainder-man; but it was answered, that that lay at common law upon the privity of the estate, and not upon the privity of contract.

(z) See 3 Mau. & Selw. 402.

(a) 2 Lord Raym. 792; 3 Mau. & Selw. 306.

*CHAPTER XVIII.

[*455]

OF POWERS OF SALE, AND EXCHANGE AND PARTITION.(1)

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|---|--|
| 2. How they should be created. | Whether a partition is within a power of sale and exchange. |
| 4. What limitations they authorize. | |
| 5. Where the appointment may be to a trustee. | 52. Partition may be by circuitry under power of sale. |
| 7. Where the power is authorized by articles. | 53. Payment for owelty of exchange valid. |
| 10. Or by a will directing a settlement. | 54. } Whether by accession of fee powers |
| 13. Where in a settlement by a remainderman, a prior tenant for life may join and raise an immediate power. | 60. } merge. |
| 15. Where a remainder may be sold. | 56. } Where power may be executed whilst |
| 17. } Where the heirs of a deceased trustee | 58. } trust remains for any. |
| 18. } of a power must concur. | 61. Control of equity over trustees of the powers. |
| 19. Where articles are in that respect duly followed. | 62. For what object the powers should be exercised. |
| 24. Ware v. Polhill, with observations. | 64. Not for a rent-charge. |
| 26. Unlimited powers of sale and exchange valid. | 65. Tenant for life not entitled, on sale of estate, to value of the timber. |
| 31. May be exercised beyond the line of perpetuity. | 67. Unless cut before the sale. |
| 33. Powers of sale upon conditions. | 68. Where the whole estate may be sold. |
| 35. Doe v. Martin, with observations. | 69. Where the money may be applied to pay debts. |
| 38. Where the receipt of the trustees is sufficient. | 70. Tenant for life may himself buy or exchange. |
| 43. Observations on the cases. | 74. Cannot defeat his incumbrances by joining in sale. |
| 44. } How far, in case of an invalid appointment, a substituted estate is | 75. } How far leases are binding on a pur- |
| 45. } charged. | 76. } chaser. |
| 46. Estate unconverted by a trustee remains real estate. | 77. Where a power of sale is not destroyed by a new settlement. |
| 48. Power of partition does not authorize sale or exchange. | 79. Watson v. Waltham, with observations. |

1. SO FAR as the cases on powers of sale and exchange and partition are subject to the general law, or seems to illustrate

(1) Power to executor by lease, or by any other means, out of the profits therefrom arising, to support A., a lunatic; held an implied power to sell, when by no other means could a sufficient sum be raised. *Schermerhorne v. Schermerhorne*, 6 Johns. Ch. R. 70.

Where there was a power to sell with consent, the moneys to be invested for the purposes of the will, it was held, a mortgage was a void execution of a power; *Bloomer v. Waldron*, 3 Hill, 361. Under a settlement, a trust was created for A. for life, with power to appoint by last will and testament, or any other writing; a mortgage was

[*456] "it, we have already glanced at them, but it is now in order to review them as a separate class. We have

held a valid execution under the strictest rule of construction; *Lancaster v. Dolan*, 1 Rawle, 231. Power to mortgage, must be taken to mean by such an instrument, &c., as is usual in the place where the power is to be executed; *Wilson v. Troup*, 2 Cow. 195.

Power to sell, is to be executed according to usage; and a customary credit on sale of chattels having been given, the donee is not responsible; *Ethridge v. Binney*, 9 Pick. 276. Unless there be such usage, a power to sell for a certain sum, is not well executed by a sale on credit; *Ives v. Davenport*, 3 Hill, 377. Where moneys arising from the sale are directed to be invested, the sale must be for cash or its equivalent, and part of the consideration being an equitable claim of the grantee, it is void; *Waldron v. M-Comb*, 1 Hill, 114. If there be a special mode directed, it must be exercised in that manner; hence a private sale passes no title under a power to sell at public sale; *Pendleton v. Fay*, 2 Paig. 204. *Greenleaf v. Queen*, 1 Pet. R. 138. Under a power to sell, a release of the interest of the donee for a valuable consideration passes no title, for he had no interest; the instrument intended by law must be such as is proper for the disposition of the subject-matter of the power; *Griswold v. Bigelow*, 6 Conn. 269. Where there is a naked authority to act for another it must be done in the name of the principal; *Hefferman v. Adams*, 7 Watts, 117; *Strohecker v. Farmers*, 8 Watts, 188; 9 Watts, 237.

A power to sell, given by general words, may be limited as to the time in which it may be exercised by directions as to the application of the purchase-money; thus, where an estate was given to the donee to be applied towards raising and schooling testator's children, and after a general power of sale the money was directed to be laid out in other property, except what might be necessary for keeping, schooling, &c., it was said the power ceased on the children coming of age; *Clark v. Campbell*, 2 Raw. 215. And where a power to sell was given to executors who were directed to invest the purchase-money, and pay the interest to the testator's wife for life, and at her death he gave the bonds and other securities to his son, it was held the object of the power was the support of his widow, and at her death it was extinguished; *Jackson v. Jansen*, 6 Johns. 73. In *Brown v. Arnstead*, 6 Rand. 601, a power to sell for so much as the executor thought the land was worth, was considered suspended by renunciation of the widow, thereby encumbering the estate with her dower, until her death. Where a power was given to sell and pay two legacies, residue among children equally; it was held, the power was gone by the lapse of one legacy, the other being void; *Sharpesteen v. Tillou*, 3 Cow. 651; *Jackson v. Jansen*, 6 Johns. 73.

Where the donees are named as mere executors, and not individually, the authority under the statute is vested in such as may act; *Shelton v. Homer*, 5 Metc. 465; otherwise if they be also named individually. *Ib.* The executors, viz., A. B. and C., shall be empowered to sell; when my debts are paid, if anything is left, I give, &c., they take *ratione officii*, the subsequent clause showing it to be for payment of debts; and one executor, the others surviving, may sell by virtue of the statute Hen. VIII. *Zeback v. Smith*, 3 Binn. 69; *Hunt v. Ferris*, 15 Johns. 316. Before the act of 1800, administrator did not succeed to the power to sell for payment of debts; *Moody v. Vandyke*, 4 Binn. 21. Devise after payment of debts gives no power to sell, but creates a charge in equity; *Drum v. Keeling*, 2 Dev. 283.

already fully considered where a power of sale is created, and to whom it is given under particular words, and where it may be implied, and what acts it authorises, and at what time it may be executed. The present examination will be confined principally to cases arising upon the common powers of sale and exchange, &c., in settlements.

2. As to the mode of creating a power of sale and exchange, we have already considered by what instruments they may be created. In well-drawn deeds, in which powers of sale and exchange are inserted, it is usual to give the trustees of the powers an express authority to revoke the old uses, and to appoint such new uses as will effectuate the intention of the parties, and the declaration for this purpose cannot be too general. It is not however necessary to give *express* powers of revocation and new appointment; for, whatever be the form in which a power of sale is given, it will operate as a power of revocation and new appointment, and may be executed accordingly. Thus, it was clearly holden by the Lord Keeper, in the Bishop of Oxford v. Leighton, that a direction, that a releasee to uses in a settlement should convey to such uses as A. should appoint, amounted to a power of revoking and limiting new uses, although the proviso was unskilfully penned. (a)

3. All old powers of sale and exchange merely express that the trustees may sell or exchange the land, and do not give express powers of revocation and new appointment. Sometimes the trustees are made merely to "appoint and make sale," or to "appoint and sell" the land to the uses: the words of the power being followed with the addition of the word appoint, and sometimes they are made to expressly revoke the uses of the settlement, and then to appoint to the new uses. Either mode will effectuate the intention. The latter is sometimes objected to by unskil-

(a) 2 Vern. 367; *supra*, ch. 3.

Under a statute authorizing a sale and conveyance by executors undertaking the office, if no others were appointed, or those appointed should die, it was held a discretionary power could not be exercised; and the statute only applies where a sale was unconditionally directed; *Woolidge v. Watkins*, 3 Bibb, 351. The addition of the words "for as much as in their judgment is equal to its value, is a restriction of the power, and not any peculiar personal confidence, hence such a power survives; *Brown v. Armstead*, 6 Rand. 594; *Craig v. Craig*, 7 Dana, 9. See note, ante, vol. i, *134, note 2, and *412, note (1).

[*457] ful *persons as not authorized by the power, but to this objection the Bishop of Oxford's case is a decisive answer.

4. In ill-penned powers of sale it sometimes happens that the party is authorized to appoint the estate to the purchaser, his heirs and assigns, which should never be done; for it has in this case also been contended in practice, that the estate can only be appointed to the purchaser in fee, and not to uses to bar dower, or to any other uses which the case may require. To obviate this difficulty, where it was intended to bar the purchaser's wife of dower, it has been recited (contrary to the fact) that the contract was entered into by A. as agent for B. the real purchaser, and the estate has been conveyed to A. in fee, in trust for the purchaser. But upon the authority of Phelp and Hay it may be thought that the doubt in this case is not well founded. When it is once admitted that the intention of the power is to be regarded, and not the precise terms of it, (b) there seems to be no ground for this practice. The *intention* expressly is, that the inheritance of the estate shall be sold, but the mode of the conveyance rests in the breast of the purchaser. The direction simply amounts to a declaration that the fee shall belong to the purchaser. It merely expresses what would be implied in the power, in the absence of an express provision, it being clear that a power to trustees to sell an estate will authorize them to appoint the estate to the purchaser in fee, although the power be silent on that head. Now, if the direction were wholly omitted it would scarcely be doubted that the estate might be conveyed to any uses the purchaser should desire. Therefore, according to the rule of law, that *expressio eorum quæ tacite insunt nihil operatur*, it may be contended, independently of decision, that although the trustees of the power are only authorized by the words of it to appoint [*458] the estate to the purchaser in fee, *yet they may appoint it to uses to bar dower, or in any other manner that the purchaser may direct. (I)

5. In a recent case (c) the power of sale and exchange in a settlement was given to trustees with the consent of the husband

(b) See *Morris v. Preston*, *infra*; and see *Mackintosh v. Barber*, *Supra*, vol. 1. p. 142.

(c) *Howard v. Ducane*, *Turn. & Russ.* 81.

(I) This is of little importance since the new law of dower.

and wife, and it was declared that when sold, the estate should be freed from the uses, and that the settlement should enure to the purchaser in fee. The trustees, with the consent of the husband and wife, conveyed part of the property to one as a purchaser, his heirs and assigns, to the use of the husband and the nominal purchaser, his heirs and assigns, to the use of the husband and the nominal purchaser, their heirs and assigns; but as to the estate of the nominal purchaser, in trust for the husband in fee: and the conveyance recited, that the purchase was on behalf of the husband. Two objections were made: one, that the real purchaser's consent was necessary to the sale, and therefore he could not buy; the other, that the appointment was to an agent merely, and the power, therefore, was not well executed. Lord Eldon observed, as to this point, that there was nothing in the nature of such a power as this to prevent one man from becoming a purchaser in trust for another; and considering the nominal purchaser as the purchaser, it did not appear to him to be any objection to the execution of the power, that the parties had thought proper to put upon the instrument a declaration of trust for the person for whose benefit he was a purchaser. It appeared to him to make no difference whether the purchaser chose to execute a declaration of trust by the same instrument, or by another instrument.

6. In truth, the law can only look to the person who fills ostensibly the character of a purchaser. No one could doubt that an agent with an undisclosed principal could buy and obtain the fee under such a power; and why, *with [*459] reference to the form of the conveyance, should he not disclose the fact? The real purchaser may desire to have the estate vested in a trustee, and may not choose to take a conveyance to himself in fee. The case of *Howard v. Ducane* was, of course, stronger against the power to limit the fee to a person not being the *real* purchaser, than a mere power to appoint to the purchaser.

7. If uses in strict settlement are directed to be raised by a will, and it is intended that the usual power of sale and exchange should be inserted in the settlement, an express declaration of the intention should be made; such a power cannot be implied. (*d*) The same observation applies to articles for a settlement. But

(*d*) *Wheate v. Hall*, 17 Ves. jun. 80.

in a case(*e*) where the articles contained a clause that the husband and wife, and the survivor, should have a power to appoint new trustees, “and also all such other powers and provisos for effectuating the intention of the parties as are usually contained in settlements of the like nature as shall be approved of by the trustees;” Lord Eldon determined the powers of selling, exchanging, and investing in new purchases, are usual in settlements, and therefore powers of sale and exchange came within the meaning of this clause, and ought to be inserted in the settlement. In the case of *Williams v. Carter*,(*f*) where money was settled, with a power to the trustees to change the stocks, funds, and securities, in which it might be invested, for others of the same or the like nature, and the intended husband covenanted to settle any real estate to which he and his wife might become entitled in her right, upon the same trusts, and subject to the powers, &c. declared of the funds, or as near thereto as the nature of real estate would admit of, it was held that the settlement ought to contain powers of sale and exchange, and a distinction was taken between a covenant to settle a particular estate, and a covenant to settle all estates, generally.

[*460] *8. And in *Hill v. Hill*,(*g*) marriage articles provided for a strict settlement with powers to the intended husband to charge by way of mortgage for the relief of his estates, and also to charge portions for younger children, “and likewise all other powers, provisions, clauses, covenants and agreement usually inserted in settlements of the like nature, *and* which shall be proper for effecting any of the purposes aforesaid: it was held that a power of sale and exchange might be inserted in the settlement. The Vice-Chancellor observed that there was a palpable distinction between inserting in a settlement powers for the better management and better enjoyment of the settled estates, which are beneficial to all parties, and powers which confer personal privileges on particular parties, such as powers to jointure, to raise money for any particular purpose, &c. But powers of leasing, of sale and exchange, and (where there is any joint property, or there are any mines, or any land fit for building purposes,) powers of partition, of leasing mines, and of granting building leases, are

(*e*) *Peake v. Penlington*, 2 Ves & Bea. 311; vide *supra*, vol. 1. 513.

(*f*) Appendix, No. 22.

(*g*) 6 Sim. 136.

powers for the general management and better enjoyment of the estates, and such powers are beneficial to all parties. He thought it was not necessary that *and* should be read *or*. The intention was that the clause should be read as if it stood thus: "and likewise all other powers, provisions, clauses, covenants and agreements, which shall be proper for effecting any of the purposes aforesaid, and which are usually inserted in settlements of the like nature;" which would include everything.

9. In a case where articles for a settlement of estates in Ireland stipulated that the settlement should contain all the covenants, provisoes, and conditions usually contained in marriage settlements made in England, it was not doubted that a power of sale and exchange was authorized, and it was held that the power might authorize exchanges for *estates in Eng- [*461] land as well as Ireland, or the investment of money produced by sale in estates there.(h)

10. In *Brewster v. Angell*,(i) estates were devised to trustees, in trust for certain children for their lives, with remainders in strict settlements. And the testator, after directing his trustees to make a settlement of his estate accordingly, and that the share of each of his two daughters A. W. and M. W. Smith should be for her separate use, with a power of appointment amongst her issue, directed that in such settlement there should be inserted all proper powers and authorities for making leases, and otherwise, according to circumstances, to and for the tenants for life, to be exercised by them at such times as they should be by law qualified so to do, and the same powers and authorities to be exercised on their behalf by the said Brewster, and the others their heirs and successors, whenever such tenants for life respectively should be disabled or disqualified by law to act freely and of their own uncontrolled authority in the said premises; and that provisions should also be made in such settlement for the appointment of new executors, trustees and guardians, in the like manner as the said testator had directed respecting his personal estate, alluding to another will disposing of his personalty.

A settlement was made under the direction of the Court, in which was contained a power to the trustees under the will, and

(h) *Duke of Bedford v. Marques of Abercorn*, 1 Myl. & Cro. 312.

(i) 1 Jac. & Walk. 625.

the survivors, &c. with the consent of the tenants for life, and after their decease, of the person in remainder, if twenty-one, and if not, of the proper authority of the trustees, to sell, exchange and make partition of the estates. The estate was sold under the power, and the purchaser objected to the title. The Lord Chancellor said the question was, whether a power given to trustees to sell, with the approbation of the tenant for life, which he could not give if he were disqualified, is such a power [*462] as is authorized to be put into this settlement. Now, what are the words of the will? they are, "all proper powers for making leases and otherwise, according to circumstances, &c.;" whatever then is the meaning of the words "and otherwise, according to circumstances," they are to be powers and authorities "to the tenants for life, to be exercised, &c." Supposing that a power of sale and exchange could be given under these words, it is, according to the common sense of them, to be given to the tenants for life, and in case they are disqualified, to the trustees; but this is a power to act with the approbation of the tenant for life, qualified or not. The inclination of his opinion was, that this was not a proper power; but he was quite clear he could not compel a purchaser to take a title depending on it. The question to be decided was not whether a power of selling and exchanging might not have been given to the tenants for life, if qualified to act, and if not qualified, to the trustees; but whether such a power could be given to the trustees acting with their approbation, should they be or be not qualified.

11. Upon a bill filed to correct the settlement, it was held that the will did not authorize the insertion of a power of sale. (k)

12. We have already seen at what time a power may be executed. (l) This question seldom arises upon the common power of sale in a settlement.

13. In a recent case, a mother was tenant for life, with remainder to her daughter in tail. In pursuance of a decree, on the daughter's marriage the estates were to be settled to the husband for life, with the usual remainders over, with powers of sale and exchange. The mother joined in the recovery and settlement, and the estates were limited *to her for life*, remainder to the hus-

(k) *Horne v. Barten*, Jac. 137.

(l) *Vide supra*, vol. 1, p. 330.

band for life, with remainders over according to the decree; and a power of sale was inserted at any time during the lives of the husband and wife, and the survivor, with their, his, or her consent.

*The estates were sold in the life-time of the mother; [*463] and it was objected, that the power could not be executed until after her death; but the Master of the Rolls decreed the purchaser to take the title.(*m*)

14. In this case the interests of the remainder-man were not accelerated, for the mother took a life interest in the purchase-money and in the estate to be bought with it.

15. But if a reversion or remainder is settled to the common uses, with a power of sale in its terms general, the reversion or remainder may be sold so as to give to the persons entitled under the settlement an interest in possession. And it will not be held that a sale cannot be made until the remainder fall into possession, merely because the power authorizes an exchange for another estate in possession. A contract by the tenant for life, not claiming under the settlement, and the trustees of the power of the fee in possession, will be sustained upon the money being duly apportioned between the life estate and the remainder in fee.

16. This was decided by the case of *Clark v. Seymour*,(*n*) where a remainder in fee expectant upon a life estate was settled upon a marriage to the usual uses in strict settlement; with a power to the trustees, at any time or times thereafter, with the consent of the husband and wife, &c., to sell or exchange for other estates in fee simple in possession, and to invest the purchase-money in the purchase of other estates in fee simple in possession, to be settled to the uses of the settlement, with the common direction as to the application of the money until so invested. The tenant for life, and the trustees of the power, with the proper consents, sold the fee, and the contract was enforced against the purchaser. The court was of opinion that the trustees could sell the reversion at any time, for terms were used in the settlement which are applicable to an immediate sale, and there could be no doubt about the meaning of the *expres- [*464]

(*m*) *Fry v. Fish*, Rolls, 5th August, 1811, MS. See *Tasker v. Small*, 6 Sim. 625. 3 Myl. & Cra. 63.

(*n*) 7 Sim. 67.

sions, and it was referred to the Master to apportion the purchase-money, having regard to the interest of the parties.

17. In some instances, powers of sale are so framed as to prevent the surviving trustees of it from acting without the concurrence of the heir of the deceased trustee. We have already seen how this doctrine operates upon powers of consenting, given to trustees and their heirs.(o)

18. In a late case,(p) where a power of sale was reserved by a settlement to three trustees *and their heirs*, and there was a power to appoint new trustees upon the death, &c. of any of the trustees, it was held that two surviving trustees could not execute the power, although the money was directed to be paid to the trustees, or the survivors or survivor of them, or the executors, administrators or assigns of such survivor. But in a later case(q) a devise to trustees, their respective heirs and assigns, upon trust that they, their respective heirs and assigns, should sell, &c., was held to be a common devise with the usual trust, the word "respective" being rejected.

19. In *Hall v. Dewes*,(r) the question was whether a power of sale was authorized by the articles, by which the husband covenanted with three trustees to settle the estate to himself for life, remainder *to the three trustees in fee*, upon trusts, and particularly to sell as the husband should direct, or if no direction, then after his death. And it was provided, that there should be a power to the husband, with the consent of the three trustees, *their heirs or assigns*, to sell or exchange, for such equivalent as by the trustees or the survivor should be thought reasonable: and the trustees or the survivor, his executors or administrators, were to give receipts. There was also to be the usual power of appointing new trustees upon the death, &c. of any of [*465] the three *trustees, &c. By the settlement a power of sale was reserved to the husband, with the consent of the three trustees, or the survivors or survivor of them, or the heirs or assigns of such survivor, or of the trustees or trustee for the time being. The question was whether a sale, with the con-

(o) *Supra*, ch. 5, s. 3.

(p) *Townsend v. Wilson*, 1 Barn. & Ald. 608.

(q) *Jones v. Price*, 11 Sim. 557.

(r) *Jac.* 189. See ch. 19, post; and see 11 Sim. 563.

sent of a new trustee and of a surviving trustee, was good, without the concurrence of the heir of the deceased trustee. Lord Eldon refused to make the purchaser accept the title. With respect to *Townsend v. Wilson*, he asked, whether the Court of King's Bench considered that the two surviving trustees, and the heir of the deceased trustee, were to act together; for it was one thing to say that the survivor should not act until another was appointed, and a different thing to say that the heir of the deceased trustee could not act in the meantime. He did not agree with the decision in that case; he believed that he should not have been induced so to decide it.

20. Lord Eldon's question could not be answered, because the Court of King's Bench gave no reasons for their judgment; but they certified that the two surviving trustees could not exercise the power, not that they and the heir of the deceased trustee could. There is certainly some difficulty in construing such a power, as introducing the heir of a deceased trustee in his place, but *such are the words*, for the words *and their heirs* can have no other meaning; and as the power of appointing new trustees is rarely made imperative, the directing the heir to stand in the place of his ancestor, at once keeps up the number of the trustees, and if the heirs are not fit persons to act, drives the parties to exercise the power of appointing new trustees.

21. There was more difficulty in deciding against the title in *Hall v. Dewes* than there was in *Townsend v. Wilson*, for in the former case the remainder in fee was vested in the trustees to sell, and it is clear that the survivors or survivor of the trustees could have sold without the concurrence of the heirs of the deceased trustees. The power of *sale and exchange [*466] directed to be inserted was with the consent of the three, *their heirs or assigns*; seeming, therefore, to require the consent of the very persons in whom the previous trust for sale was reposed, and the other expressions in the articles strongly confirmed this view. But if the articles imperatively required new trustees to be chosen upon every vacancy,(s) then Lord Eldon's opinion upon that clause which in effect disabled surviving trustees from acting in the power of sale until the number was complete.

22. In a later case, ^(t) an estate was conveyed to secure a sum of money to a trustee for the lender in fee, upon trust, when required by the lender, that he and his heirs should sell the estate in such lots as he or they should think proper : and the receipts of the trustee, his heirs, executors, administrators and assigns, were to be discharges. The trustee died intestate, and his heir conveyed the estate to another person upon trust to sell. Sir Launcelot Shadwell, V. C., held that the assignee could not exercise the trust. The necessity, he said, of discussing this point upon principle was superseded by the decision in *Townsend v. Wilson*, and as the judgment in that case remained unreversed, it decided the question under consideration. It had been correctly stated, that in *Hall v. Dewes*, Lord Eldon did not approve of the decision, but he felt himself bound by it ; so that he would not compel the purchaser in that case to take the title. Now in *Townsend v. Wilson* the power of sale was given to three trustees and their heirs, and the money to arise by sale was directed to be paid to the trustees and the survivors or survivor of them ; so that in that case there was the very distinction that occurred in this ; one of the trustees died, and the power was exercised by the two survivors, and the question was whether it was a good execution of the power. The Court of King's Bench determined that it [*467] ^u was not. The V. C., therefore felt himself bound by that authority.

23. The application of the case of *Townsend v. Wilson* to that of *Bradford v. Belfield* is not perhaps very obvious. The V. C. must have considered it as deciding that the *heir* of the trustee alone could sell. ^(u) In the former case the point decided was, that the two surviving original trustees could not by themselves execute the power. There was no attempt to introduce a new trustee. The objection on the contrary was, that not having the concurrence of the heir of the deceased trustee, they had not appointed a new trustee, which they had power to do : whilst in the latter case the objection was, that the heir had, without any sufficient authority, transferred his trust or power to a stranger. In this case it was of course never doubted that the heir of the origi-

(t) *Bradford v. Belfield*, 2 Sim. 265.

(u) See now *Cooke v. Crawford*, 13 Sim. 91.

nal trustee was the trustee in his place; whilst in *Townsend v. Wilson*, the question was whether the heir *was* a trustee until displaced, in the room of his ancestor. *Bradford and Belfield* seems to depend upon the doctrine ruled in *Cole v. Wade*,^(x) rather than upon that which arose in *Townsend v. Wilson*. The cases should not be confounded.

24. In *Ware v. Polhill*^(y) freeholds and copyholds were devised to the testator's son for life, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail, remainders over; and leaseholds were bequeathed to trustees, to renew and to pay the rents to the persons who under the above limitations should for the time be entitled to the rents of the freeholds and copyholds; and the trustees were empowered at any time thereafter, with the consent of the person or persons who should as aforesaid be entitled to the rents of the freeholds and copyholds, or in case such person should be a minor, at the discretion of the trustees, to sell the leaseholds, and lay out the purchase-money in the purchase of free- [*468] holds or copyholds, to be settled to the uses of the freeholds and copyholds devised; and until such purchase, the money to be invested, and the interest paid to the persons for the time being entitled to the rents of the freeholds and copyholds devised. The power of sale was not exercised; a grandson died under twenty-one; and upon a bill filed, it was insisted, that under the provisions of the will the intention of the testator was, that all his property not real estate should, after payment of his debts, &c., be converted into real estate, and limited in strict settlement; and the trustees ought to have sold all the leasehold estate accordingly. That the intention was to provide for the issue male; and that the leasehold estate, while unsold, should go with the freehold, as far as the rules of law and equity would permit, and not vest in a tenant in tail, so as to be transmissible, unless such tenant in tail attained the age of twenty-one. The Lord Chancellor's opinion was against this construction. Upon a subsequent day he observed, that upon further consideration as to the leasehold estate, he thought that power of sale was void, for it might travel through minorities for two centuries; and if

(x) Vide *supra*, vol. 1, p. 150.

(y) 11 Ves. jun. 257.

it is bad to the extent in which it was given, you cannot model it to make it good. He thought the soundest ground was that the power was bad.

25. The point decided by the above case is, that where a leasehold estate is settled as a real estate, but so as to vest absolutely in a *quasi* tenant in tail, a power to defeat his estate by selling the property and buying a real estate to be resettled, is void. In practice, the case was at first treated as an authority that the common power of sale and exchange was void, as too remote, if it were not expressly confined to lives in being, and twenty-one years afterwards. But it is clear that Lord Eldon did not mean to impeach the validity of such powers. Such a power does not, like the power in *Ware v. Polhill*, operate to defeat the estate of the minor tenant in tail, but *transfers* it from one [*469] property to another. He is still tenant in tail; whereas in *Ware v. Polhill* the effect of a sale might be to defeat altogether the estate of the representative of a person who died entitled to a vested interest in the absolute property.

26. As to the validity of powers of sale and exchange not restrained to lives in being and twenty-one years afterwards, it was observed in former editions of this work, that the general practice had been not to confine them, and that half the titles in the kingdom depended on the validity of such powers. That if the power were within the line of perpetuities, the line could always be drawn, and there appeared to be no reason why it should be deemed void in its creation. Such powers, it was observed, appeared to be valid on the same ground that a shifting use may be limited to take effect at any period, however remote, where the estate is regularly limited in tail, because the tenant in tail may destroy the shifting use by a common recovery; yet there the estate of a tenant in tail not having suffered a recovery may be defeated altogether; whereas under the exercise of a power of sale and exchange there is merely a change of title, and not a destruction of interest. In point of fact such a power enables the alienation of property without affecting the interest of the person beneficially entitled to the property.

27. It has since been determined that such a power is valid. Thus, in *Boyce v. Hanning*, (z) the estate was limited upon a

marriage to the husband for life with a limitation to trustees to preserve contingent remainders, remainder that the wife might receive a rent-charge, and subject thereto, to the children or remoter issue of the marriage, as the husband and wife or the survivor should appoint, and in default of appointment to the children in fee, with executory limitations over to the others, in case any died under twenty-one without leaving issue; and if no child, or they all died under twenty-one without leaving issue, to the husband in fee; and in the settlement there was a power to the husband for life, and after his death for the [*470] trustees for the time being during the minority of any child of the marriage, to lease, and a power of sale and exchange to the trustees or trustee for the time being, with the consent of the husband and wife or the survivor of them, and after the decease of such survivor, at the discretion of the trustees or trustee for the time being; and there was a power given to appoint new trustees to the husband and wife, and after their decease to the surviving or continuing trustees or trustee, or his or their executors or administrators. A sale was made under the power in the lifetime of the husband and wife; and upon a case sent by the Master of the Rolls, the Court of Exchequer certified their opinion that a sale and valid assurance of the property could be made under the power. Upon the observation in this work, that the power of sale did not tie up property, but enabled the alienation of it, Bayley, B. observed, that it enabled the trustees to sell, but the owner in fee, who would otherwise be able to sell, was incapacitated. (a) But of course this applies only to the reversioner or remainder-man, and his power of alienation is not fettered, although the subject of his transfer is still liable to the conditions in the settlement.

28. The same decision has been made in several other cases where the power was general and unrestricted, but in all of them the sale was actually made in the lifetime of the tenants for life who were *in esse* at the date of the settlements. (b) The general point is set at rest, but it may still be a question during what period the power is capable of being exercised. In a recent case,

(a) 2 Crompt. & Jerv. 339.

(b) Biddle v. Perdins, 4 Sim. 135; Powis v. Capron, Waring v. Coventry, ib. 138. 140 n.

the Lord Chancellor said that the rule in the case before him was within the permitted period, and there would not, he thought, be much doubt of its validity until the expiration of that period.(c)

29. It has been said by a learned writer,(d) that [*471] it seems *that the common power of sale and exchange in marriage settlements and wills, though not prescribed to be exercised within a given period, is good as to the estates for life, because as to them the power falls within the limited period; and also as to estates tail, because the power may be barred by any tenant in tail, and is void as to the remainder or reversion in fee when it falls into possession or is discharged from the estates tail; so that the power will fail when the particular estates, perhaps when the estates tail, shall determine.

30. The point is not without difficulty. The power, although unlimited as to time, is, as we have seen, good for the lives of parties living at the date of its creation; and it may be *now* that the power might be held further to exist for twenty-one years from the death of the survivor of the lives. Where the power is to be exercised by or with the consent of a tenant for life, that is of itself a lawful limit—the very power points it out—and so far is good. If the power proceed to authorize the trustees, after the death of the tenant for life, and during the minority of tenants in tail, to sell or exchange, that might be deemed good *pro tanto*, that is, during the twenty-one years from the death of the tenant for life. If the Court should go further, the power might travel through generations. If it might be exercised legally *against* a tenant in tail, although really for his benefit, it would be on the ground that the tenant in tail might bar the power if he pleased, and although he could not do so during his minority, when, if at all, the power would be exercised against him, yet an executory limitation or shifting use after an estate tail is open to the same objection, for the event may happen during the minority of the tenant in tail, and before it is in his power to bar the entail, and yet long after the legal limit of such limitations, if they are not preceded by an estate tail. It would be difficult to distinguish the cases. If an exercise of the power after lives in being and twenty-one years were allowed on this ground, it of course could

(c) 4 Myl. & Cra. 482, 483.

(d) 2 Prest. Abstr. 158.

not be avoided as against the remainder or reversion *in fee, when that falls into possession : for unless the [*472] power continue in force so as to carry *the fee*, it cannot be exercised, and if it can, the same ground that gives it validity against the estates tail will support it against the remainder or reversion, so that an execution of the power *previously* to the remainder or reversion in fee falling into possession, would be valid. But clearly after the remainder or reversion in fee had fallen into possession, the power could not be exercised. It is not improbable that the power may be sustained throughout its whole range. There appears to be no principle and authority sufficient to support such a decision.(e)

31. A case decided since the last edition of this work goes to this extent,(f) for although the power was to lease, yet as the power was an unlimited one to trustees, the question was the same : and the Vice-Chancellor held, that as in due time a recovery might be suffered [or the entail barred,] in which case the power would be destroyed, the objection to the power on the ground of perpetuity could not be sustained. And in a later case in Ireland, the Chancellor observed, that the question had often been discussed in recent times, how far the general powers of sale and exchange, which are usual in settlements, are good, and their validity had been doubted. He could not say that he entertained any doubt upon the point. He thought they were perfectly good, although not in terms confined within the rule against perpetuities, and upon this principle, that such powers may be barred by the owners of the preceding estate tail ; and if once an estate in fee has been acquired by any one claiming under the limitations of the settlement, by which the power was created, it naturally ceases.(g)

32. Here we may observe, that in a settlement made under the direction of a Court of Equity in pursuance of a trust or contract. a power of revocation to be executed with the consent *of the Court cannot be introduced in order to guard [*473] against any mistake in the settlement.(h)

33. Some powers of sale are created in terms which permit their

(e) See 2 Kee. 671.

(f) Wallis v. Freestone, 10 Sim. 225.

(g) 4 Dru. & War. 32.

(h) Banks v. Lady Le Despencer, 11 Sim. 508.

exercise only in the event of another estate proving deficient to answer certain charges, or another estate being first settled to the same uses, or the like. And as these conditions consist, not merely of form, but are of the very essence of the gift or reservation, they perhaps more than any other require a strictly literal performance.(1)

34. Therefore, where a power was given to trustees to sell for the purpose of raising as much money as the personal estate should prove deficient in paying debts, it was decided by Jones, Croke, and Barkeley, Justices, that the condition was a precedent condition, and that the power would not authorize a sale unless there was an actual deficiency, and then so much only of the estate could be sold as was sufficient for the payment of the debts, and consequently that the amount of the debts and the value of the personal estate ought to be shown, so that the Court might judge whether the condition was performed or not.(i) Great difficulty frequently arises in practice from powers like this, as it is difficult to satisfy a purchaser of the deficiency, and the actual extent of it. It should, therefore, in these cases invariably be provided, that the power shall, *quoad* a purchaser, be well executed, although there be no deficiency, and that he shall not be bound to inquire into or ascertain whether there actually be any deficiency.(k)

35. So in a case,(l) where in a strict settlement it was provided, that in case the husband and wife, or the survivor, should be desirous to sell the estate, it should be lawful for them [*474] to revoke the uses of the settlement, and for the *trustees to sell the same for the best price, and convey the same to a purchaser, *so as* that the purchase-money was paid to them, and not the husband and wife, to be laid out by the trustees in the purchase of other estates, at the request of the husband and wife, or the survivor, to be settled to the same uses. The trustees

(i) *Dike v. Ricks*, Cro. Car. 335; *Wm. Jones*, 327; 1 Ro. Abr. 329, pl. 9; 3 Vin. Abr. 419, pl. 9; and see *Popham v. Hobart*, 1 Cha. Ca. 280; and *Culpepper v. Aston*, 2 Cha. Ca. 115. 221, as explained, *Treat. Purch.* 6th edit. p. 514; and see *Bowman v. Matthews*, For. Exch. Rep. 163.

(k) See *Treat. Purch.*

(l) *Doe v. Martin*, 4 T. Rep. 39.

(1) See *Hall v. McLaughlin*, 2 Bradf. Surr. Rep. 115.

were authorized to invest the money until a sale, and to pay the dividends to the persons entitled to the real estate; and the receipts of the trustees were made a sufficient discharge to the purchaser. By deed the husband and wife revoked the uses, in order that the fee might be sold according to the intent of the settlement; and by another deed, the estate was under the power appointed to the purchaser in fee, who paid his purchase-money. But the heir of the surviving trustee was an infant of tender years, and part of the money was applied to the payment of a prior mortgage.(I) and the residue of the money really reached the hands of the husband, and no part of it was ever invested. The purchaser's agent was privy to this fraudulent disposition of it. After three arguments, the Court held the revocation and appointment altogether void. Lord Kenyon was clearly of opinion that *the deed of revocation*, taking the whole of the power together, was no legal revocation. They had only a power to revoke, *on condition* of re-investing the money in the purchase of another estate for their children. And it would be strange to say that any interval might happen between the sale and purchase of that other estate, [that is, it could be maintained that the purchase of another estate might be delayed for any period, however long]; it was all to be considered as one deed and one act. And though the purchase money need not have been re-invested immediately, yet it was to lie in the hands of the trustees until a proper opportunity should offer of so re-investing it. He considered the purchaser bound by the fraud of his agent. He then stated, that the power was restrained *so as* that the money was paid to the trustees, and by them invested in other estates; [*475] *the whole therefore was considered as one transaction.*

As, therefore, the money was only paid to the infant trustee for form's sake, he held the whole transaction absolutely void, as well in a court of law as a court of equity. Mr. Justice Ashurst considered the power, not an absolute, but a *conditional* one. Two conditions were annexed to the execution of the power: the one that the money be paid to the trustees: the other, that it be laid out in the purchase of other lands to be settled to the same uses. Neither of these had been complied with, and consequently

(I) It does not appear that the purchaser obtained a transfer of this mortgage.

the deed of revocation was a mere nullity. Mr. Justice Buller and Mr. Justice Grose delivered opinions to the same effect. The latter observed, that this was merely a conditional power, which must be considered altogether; and no part of the execution of it can be good, unless the whole be so.

36. The point sought to be established was, that the deed of revocation standing *per se*, destroyed at law the estate of the children, so as to prevent their right to recover. But this was overruled, and the case establishes this important rule, that where a revocation is authorized for a particular purpose, it is to be considered as part of the entire transaction, and if that is so radically affected with fraud as to be void even at law, the revocation as part of it, although good on the face of it, will be void also. (m) It would be dangerous to carry this rule too far. In this very case, for example, the purchaser paid off a prior mortgage, and yet the estate was taken from him without making any allowance to him in respect of it.

37. But the Judges expressed a clear opinion, that the power was coupled with *two* conditions: 1. That the trustees should receive the money; 2. That they should re-invest it. That the power was a conditional one admits of no doubt, but that there were two conditions annexed to it, or one with two branches, could not perhaps be maintained. The purchaser was [*476] *bound to see that the purchase-money reached the hands of trustee, but when there, *bonâ fide*, the clause in the settlement, that the trustee's receipt should be a discharge, made the receipt a full exoneration of the purchaser. An immediate re-investment of the purchase-money was neither required nor contemplated by the settlement, and the purchaser could have no further control over the money, as the power expressly required that it should reach the hands of trustees, and remain there to be re-invested. If, therefore, the transaction had been *bonâ fide*, the purchaser would, it should seem, have had a good title upon payment of the purchase-money to the trustee. In *Doe v. Martin* the infancy of the trustee, who had active duties to perform, presented a serious obstacle in the way of a sale under the power.

38. In the later case of *Roper v. Halifax*, (n) the power was

(m) Vide *infra*, *Cockerell v. Cholmely*.

(n) App. No. 3.

for the trustees to sell, with the consent of the parties, *so as* that the money to arise by sale should be invested in other estates; and there was the usual clause that the trustee's receipts should be discharges, and the usual clause that they might lay out the moneys in the funds, &c. until a purchase could be found. The question was, whether a conveyance to a purchaser under the power would be affected if the purchase money should not be laid out, and the lands purchased therewith settled as mentioned in the settlement. The Court was of opinion that a conveyance to a purchaser would not be affected by this event because it was expressly provided, that the receipt of the trustee should be a discharge to the purchaser. There was no case from which a contrary inference could be drawn. The case of *Doe v. Martin* was of a very different description from the present; there the money was to be paid into the hands of trustees, and it was agreed that the purchasers should not be bound to see to the application of it; but the question there was, whether the money was *bona fide* paid; there was an infant trustee, and *they put [*477] the money in his hands. That case is wholly unlike the present, and cannot govern it. They were of opinion that by the express terms of the deed, provided the transaction was *bona fide*, the receipt was a sufficient discharge. This decision places the point upon a right footing.

39. Again, where a power of revocation was given with the consent of trustees, *so that* at or before the revocation other estates were assured of equal or better value to the like uses, it was considered clear, that if an *equitable* estate had been conveyed, the power would have been badly executed *at law*, but whether in equity was doubted; and it was also thought that a purchaser of the settled estates would have been bound to have shown the value of the substituted estates.(o)

40. And in a case where a power of revocation was given, *so as* at the time of such revocation he settled other lands free from incumbrances of as good or better yearly value. Lord Hardwicke was clearly of opinion that the power of revocation was not well executed, as the substituted estate was not of equal value, and was charged with an incumbrance.(p)

(o) *Cox v. Chamberlain*, 4 Ves. jun. 631

(p) *Burgoigne v. Fox*, 1 Atk. 575.

41. In *Lamplugh v. Hebden*, (q) in a marriage settlement a proviso was inserted, that if the husband should settle other freehold estates of 100*l.* a year to the same uses, the settled estate should vest in the husband in fee. He exercised the power by settling other estates, and then sold the estate originally settled; and Lord Hardwicke held that it was incumbent on the seller to make out that he had effectually settled other lands of the value of 100*l.* a year, before he could compel the purchaser to take the title.

42. In *Hougham v. Sandys*, (r) a power of sale and [478] exchange was given to the husband and wife, with consent of the trustees *so always* that the moneys arising by such sale should be laid out in the purchase of other estates, and the estates so to be purchased, or the estates to be taken in exchange, should be settled to the uses of the settlement, and *then and in such case* the uses, &c. thereby declared of the estates so sold or given in exchange should cease; and it was held that the legal estate would not under the execution of the power vest in a purchaser, unless it had subsequently happened that the purchase-money was laid out in the purchase of lands to be settled to the uses of the lands sold.

43. These cases should not be dismissed without an observation on the impolicy of the settlements upon which they arose; they tend only to expense and trouble in practice, as a purchaser could not in general be compelled to complete his purchase without the sanction of a decree in equity, and there are few cases in which he could be advised to accept the title without a decree. It would be much better wholly to omit a power of sale in a settlement, than to fetter its operation by requisitions like these. The *usual* power of sale is exactly adapted to effectuate the intention of the parties: the trustees are authorized, with the proper consents, to sell the estate absolutely, and are directed to lay out the money in the purchase of other estates; but this is not made a condition affecting the execution of the power; on the contrary, the trustees are authorized to give receipts to the purchaser, which it is declared shall exonerate him from seeing

(q) 1 Dick. 78; Barnard. C. C. 371; 2 Eq. Ca. Abr. 170, pl. 29. See *Howell v. George*, 1 Mad. 1.

(r) 2 Sim. 95. 145.

to the application of the money;(s) and they are empowered to lay out the money at interest, until invested in the purchase of an estate. This plan has been adopted from a conviction of the mischievous tendency of other modes.

44. Where an estate was devised, charged with debts, to trustees in fee, upon trusts, in strict settlement with a power of sale and re-investment of the money, it was [*479] held that the charge gave the trustees a power by implication to mortgage for the debts; and as they had sold one estate and bought another, which was conveyed to the uses and subject to the powers in the will, the substituted estate was held to be still liable to the implied power to raise money for the debts.(t)

45. We may here observe that a deed, in execution of a power substituting one estate in settlement for another, which simply conveys the new estate to the old uses, will not operate to charge it with the old uses beyond the extent to which the old estate is effectually discharged from those uses by the valid execution of the power.(u)

46. Where an instrument does not by force of its direction to sell, convert a real estate into personalty out and out, but the trustees have a discretion, and may convert or forbear to convert; whatever remains unconverted by the trustees will retain its original character, that is, the real estate unconverted remains real estate.(x)

47. Where a condition is imposed merely with a view to ascertain the annual value of the property to be appointed, if the circumstances to which the condition refers do not exist, the donee may appoint property of the actual annual value prescribed.(y)

48. It is clear that a power to make partition of an estate will not authorize a sale or exchange of it; but it has frequently been a question amongst conveyancers, whether the usual power of sale and exchange does not authorize a partition, and several partitions have been made by force of such powers under the direction

(s) See now 7 & 8 Vict. c. 76, c. 10.

(t) Ball v. Harris, 8 Sim. 485.

(u) Greenhouse v. Gibbeson, 10 Bing. 363; 4 Moo. & S. 198. Vide supra & qu.

(x) Walter v. Maunde, 19 Ves. jun. 424.

(y) Lidwell v. Nolland, 1 Bligh, 99.

of men of eminence. This point underwent considerable discussion on the title, which afterwards led to the case of [*480] *Abel v. Heathcote*.(z) Mr. Fearn thought that the power did authorize a partition, on the ground that the partition was in effect an exchange. The power was *to make sale of, or convey in exchange*, the estate for the best or such other equivalent interest in lands as the trustees should think proper, and for that purpose to revoke and limit new uses. The case was first heard before the Lords Commissioners Eyre, Ashurst, and Wilson. They all thought that the power was to receive a liberal construction, as its object was to meliorate the estate. Eyre thought, that upon the word *sell*, the trustees should have a power of making partition, because it was in effect to take quite a new estate. And Ashurst and Wilson thought, that whatever power might be derived from the word *sell*, the other words of the power, *convey for an equivalent*, were sufficient. They, however, ultimately declined to decide the question. Upon the cause coming on before Lord Rosslyn, he determined that the power was well executed, and founded his opinion upon its being in effect an exchange, as the consequences and effects of a partition and exchange, as to the interests of the parties, are precisely the same.

49. Nearly the same point was again agitated in the late case of *M'Queen and Farquhar*.(a) There, however, the power in terms only authorized a *sale*. Upon the first hearing, Lord Eldon expressed his opinion that even a power to exchange would not authorize a partition: and in delivering judgment he expressed the same opinion more strongly, and said he should rather have been inclined to decide *Abel and Heathcote* upon the words, "such other equivalent interest in lands," &c. But without infringing upon that case, he determined that a power of sale simply does not authorize a partition, whatever a power of exchange may do, and in a much later case he expressed the same opinion.(b)

[*481] *50. Until the question shall receive a further decision, it can scarcely be considered clear that a power to

(z) 4 Bro. C. C. 278; 2 Ves. jun. 98.

(a) 11 Ves. 457.

(b) 4 Bro. C. C. 77, by Belt.

exchange will authorize a partition. It is at least very doubtful upon what ground Abel and Heathcote was decided, whether upon the power of sale, or upon the power of exchange, and the principle of Lord Eldon's decision is in complete opposition to that of Judges in Abel v. Heathcote. They contended that the power was for the melioration of the estate, and was therefore to receive a liberal construction. Lord Eldon insisted that the terms and limitations of a power must be observed according to the contract, or the new use will not arise. And it may be observed, that if Abel and Heathcote cannot be defended on the broad general ground of a partition being authorized by a power of exchange, it certainly cannot be supported by the words "such other equivalent interest" in lands, &c. For the power did not authorize an exchange, *or* a disposition for any other equivalent interest in lands, but simply an exchange of the settled estate for an equivalent interest in other lands. These or words to the like effect must of necessity be expressed or implied in every power of exchange, and cannot by any license be cut out and read as authorizing a distinct independent act.

51. In the Attorney-general v. Hamilton, (c) Sir Thomas Plumer, V. C., thought it not safe to act upon the doctrine that a power to sell or exchange authorized a partition. A partition and an exchange are, he observed, well known modes of assurance, perfectly distinct from each other, each having its own rules. A power to make partition would not warrant an exchange. Upon the ultimate decision in Abel v. Heathcote, he observed, that Lord Rosslyn thought, contrary to Lord Commissioner Eyre, a partition was clearly in the contemplation of the parties creating the power. If (Sir Thomas Plumer added) it was, it was singular the word partition should not have been mentioned in the power. *Lord Rosslyn relied much upon the possession [*482] of the estate, and the means thereby afforded of defending an ejectionment. (d)

52. But, as Lord Rosslyn has observed, this objection may be obviated where there is a power of sale. The undivided part of the estate may be sold, the trustees may receive the money and then lay it out in the purchase of the divided part, (e) and al-

(c) 1 Madd. 214.

(d) See 1 Madd. 224, 225.

(e) 2 Ves. jun. 101. See 1 Madd. 223.

though the sale is merely fictitious in order to effect the partition, yet it should seem that the transaction cannot be impeached. The same observation applies to an exchange under a power of sale. The estate may be sold to the owner of the estate intended to be taken in exchange, and then the money may be out in the purchase of this last estate.

53. Where an exchange is made under a power of sale and exchange, although the power is silent as to paying money for owelty of exchange, yet the donees of the power may make such payment; nor will the death of one of the parties to an exchange under the power before the transaction is completed, invalidate a legal execution of the power: no analogy exists between such a transaction and an exchange at common law. (f)

54. It frequently happens that a tenant for life of an estate in strict settlement, with the ultimate remainder to himself in fee, with powers of leasing, jointuring, charging portions, sale and exchange, &c. acquires the fee by the failure of the limitations intermediate between his life-estate and remainder: and it may be questioned whether all these powers continue after the accession of the fee. Perhaps the better opinion is, that the powers cannot be exercised after the union of the estates, on the ground, not that the powers are merged, but that, according to the true construction of the settlement, they were not to be exercised [*483] *after the determination of the limitations which they were intended to over-reach. To this there could be no objection; it would not affect any prior exercise of the power, although by will. Of course where the power has been executed by deed, the accession of the fee will not invalidate the execution.

55. In *Mortlock v. Buller*, (g) the estate was settled to trustees for a term, to raise pin-money, remainder to the husband for life, with the usual remainder to trustees to preserve contingent remainders, remainder to the wife for life, remainder to trustees for a term, to raise portions for younger children, remainder to the sons of the marriage in tail, remainder to the husband in fee, with power of sale and exchange in the trustees, to be exercised at

(f) *Bartram v. Whichcote*, 6 Sim. 86.

(g) 10 Ves. jun. 292.

any time or times, at the request of the husband and wife, or the survivor. The wife died in the husband's lifetime, without issue. Lord Eldon, according to the report, stated, that the trustees had only an estate to preserve contingent remainders during the existence of the marriage; and in the event that had happened, the husband's life-estate and remainder in fee being brought together, in law the power of the trustees is extinguished and gone. The estate to preserve contingent remainders was of course still subsisting, and the life-estate and remainder in fee were only executed *sub modo*. The substantial ground upon which such a power in trustees should be held not to be subsisting is, that the *intention* of the settlement was to confine it to the time during which the uses of the settlement existed. By the decree, which was drawn up by the Lord Chancellor himself, it appears that he did not intend to decide the point.

56. In *Trower v. Knightly* an estate was devised to trustees in fee, in trust, as to a moiety for each of two daughters of the testator and their issue at twenty-one, with a power to the trustees to sell. One daughter died, and her children attained twenty-one, and were entitled to the fee of one moiety. [*484] The trustees sold the entirety; and the Vice-Chancellor held that the powers contained in the trustees until there were owners competent to deal with the whole estate, and consequently supported the sale. (h)

57. In the above case there was a power in the settlement, in case the trustees or any new trustee or trustees should die, &c., *before the trusts were fully performed and accomplished*, then for the trustees for the time being, or the surviving or remaining acting trustee or trustees for the time being, with the consent of the tenants for life for the time being, in possession, and if dead, then as the trustees should see fit, to appoint new trustees, and a proviso that it should be lawful for the trustees for the time being *during the continuance of the trusts*, to lease in possession at rack rent; and it was provided that it should be lawful for trustees for the time being, *during the continuance of said trusts*, as and when they should see fit, to sell all or any part or parts of his freehold and leasehold messuages, &c., and to invest the purchase-money by

way of mortgage, or in the funds, &c., to be held upon the trusts thereinbefore declared of his estates.

The objections to the sale were: 1. That there were two children who had attained twenty-one, and the trusts of the will had ceased to have continuance, and the power was determined; 2. That there had been a conveyance made by the daughter on her marriage, as her fourth, in favour of her husband and herself. The argument out of Court in support of these objections was: 1. That undivided shares belonging to different owners were distinct properties: 2. That where lands held in severalty vest in fee, powers cease; *Mortlock v. Buller*; 3. That here the two children had acquired the fee. Even as to the powers of appointing new trustees and powers of leasing, the powers, it was said, were gone, because the trusts had ceased. Then the power wholly ceased, for it was intended to apply only to the [*485] *entirety; unless 'part or parts' was construed to mean *undivided* parts, which was too hazardous.

58. In a later case(*i*) where some shares of an estate were devised to some of the children of the testator in fee, and one share was devised to two of the sons in trust for William, another son, for life, and after his death to convey the same to his children, &c.; and another share was given to the same sons in trust for his daughter until she should be married, or attain twenty-five, and upon her attaining twenty-five, if unmarried, to convey the same to her; but if she should marry before that age, to convey it for the benefit of her and her issue, and her husband. And the testator gave to his sons and the survivor, and the heirs and assigns of such survivor, a power at any time during the life of his wife, who took certain interests in the estates, *or at any time afterwards during the continuance of the trusts by the will reposed in them*, with the wife's consent, and afterwards with the consent of the person or persons for the time being in possession or entitled to the rents, or of their own authority if such person or persons should be in his or their minority, to sell all or any of the real estates before devised, or *such part or parts thereof as should be subject to such continuing trusts*, and the money was to be applied accordingly. William died, leaving children who were still

(i) *Wood v. White*, 2 Kee. 665, 4 Myl. & Cra. 460.

infants, and the daughter married under twenty-five, and her share of the moneys to arise by sale (the settlement contemplating that the power would be executed) was settled according to the will. And it was held that although the trusts were not performed, they were not continuing so as to authorize a sale under the power. for William's share ought to have been conveyed to his children upon his death, and the daughter's upon her marriage. And it was considered that by the death of William, although his sons were still infants, and by the marriage of Eliza, the trusts of the will as to those two-fifths had determined, and that the power to sell, which was to be effective only during the continuance of the trusts reposed by the will in the trustees, [*486] had ceased. But this was overruled upon appeal; and it was held that the conveyance of William's share ought not to be made during the infancy of the children, and therefore the trusts were continuing, and the power of sale was still subsisting. As to Eliza's share, the decree was held valid. (k)

59. But upon her share a power by implication was held to arise under her settlement, for that settlement dealt with the property as money to arise by sale of the estate, which it was assumed would be made by the trustees, who had the legal estate under the will, and this was held to create a power of sale in them by implication.

60. In a recent case, the estate for life and reversion in fee, had, by the failure of the preceding limitations, united, and the settlor had devised the reversion in fee to uses in strict settlement. There was a power of sale in the original settlement, which was still alive. It was contended, that the power still existed, and might be exercised so as to defeat the uses created by the will. The Master of the Rolls, without determining whether the power was legally extinct, held that it could never be intended to refer to a perfectly new set of limitations in a new settlement, at a long subsequent period, under a disposition of the estate made by the will of the owner of the fee. (l)

61. We may now consider how the power is to be exercised. We have already seen that the trustees of such a power acting *bona fide*, will not be controlled in equity in the exercise of their dis-

(k) 4 Myl. & Cra. 460.

(l) Wheate v. Hall, 17 Ves. jun. 80.

cretion : (m) and the common power making it lawful for them at the request and by the direction of the tenant for life to sell and convey, is a discretionary power in them. (n) We have also seen

that a *contract* to sell the estate will be enforced in [*487] equity, if it be within the terms of the power. But

that if trustees, with a power of sale, enter into a contract for sale of the estate, which would be decreed a breach of trust, equity will restrain the trustees from performing the contract. (o) They may adopt the contract for sale of the tenant for life, if they think proper, but they cannot be compelled to do so. (p)

62. Where a power of sale is given in a settlement of real estate, the object certainly is not to turn the land into money, so as to increase the income of the tenant for life at the expense of the persons entitled to the inheritance, although every well-drawn settlement contains a clause expressing, that until a convenient purchase can be found, the trustees shall lay out the money in the funds at interest. Lord Eldon, addressing himself to the usual words in powers of sale, that the trustees may sell for such price as shall appear to them to be reasonable, observes, that that expression must be construed, at least in a question between the trustees and the *cestuis que trust*, after they have with due diligence examined. The object of the sale must be to invest the money in the purchase of another estate to be settled to the same uses ; *and they are not to be satisfied with probability upon that* ; but it ought to be with reference to an object at that time supposed practicable, or at least the Court would expect some strong purpose of family prudence justifying the conversion, if it is likely to continue money. (q) (I)

(m) Vide *supra*, vol. 1. p. 326.

(n) *Thomas v. Dering*, 1 Kee. 729.

(o) *Supra*, p. 122.

(p) *Thomas v. Dering*, 1 Kee. 729.

(q) 10 Ves. jun. 302; *Watts v. Girdlestone*, 6 Beav. 188.

(I) In *Lord Mahon v. Earl Stanhope*, 9th March, 1809, MS., Sir William Grant said, that the trustee must have a reasonable prospect of being able to lay out that price in the purchase of an estate, which, from some circumstance or other, is more eligible than the estate proposed to be sold, for else it would be a mere conversion of land into money. This, he said, was very clearly laid down by the Lord Chancellor, in the case of *Mortlock v. Buller*, where the power was exactly of the same kind as that contained in the settlement before him ; and he then quoted the passage which is inserted in the text.

*63. The conclusion of the sentence shows that Lord [*488] Eldon is not to be understood to mean that the estate cannot, under any circumstance, be sold, unless the trustees have another estate in direct view. In the case before him there was not the usual direction, that until a convenient purchase can be found the money shall be laid out at interest. That direction, where it is inserted, directly negatives such a construction of the power, and many proper reasons frequently occur to induce trustees to sell the estate, although they have not an immediate prospect of purchasing another; as an advantageous offer, &c. And certainly where a sound discretion has been exercised, equity could not affect the trustees as for a breach of trust.

64. In one case, under a power of sale, the parties sold the estate for a rent-charge out of the same estate, which was to be increased in value by building on it. The Master reported against the title, and the seller acquiesced in the report; (r) and although a rent-charge may be held to be an estate of inheritance in fee-simple, within a covenant to settle such an estate, (s) yet where a landed estate is settled with the usual powers of sale and exchange, it would be contrary to the meaning of the power to substitute a mere rent-charge for the territorial possession.

65. And where under a power of sale in a will devising the estate in strict settlement, the trustee of the power sold the land, and the tenant for life, whose consent to the exercise of the power was requisite, sold the timber on the estate, and received the price of it on the ground that he was unimpeachable of waste, and therefore might have cut down the timber, it was held that the power was not well executed, and that equity could not relieve the purchaser. (t) *And it now appears that [*489] this had been previously decided in the case of *Wolf v. Hill*, (u) and *Doran v. Wiltshire*; (v) and it was there said, there was a great difference between a tenant for life cutting down tim-

(r) *Read v. Shaw*, Ch. 1807; Appendix, No. 28. See 3 You. & Coll. 375.

(s) *Middleton v. Pryor*, Amb. 390, App. (I), Blunt's ed.; and see *Lord Tankerville v. Coke*, Mose. 146.

(t) *Cholmeley v. Paxton*, 3 Bingh. 207; and see 5 Bingh. 48; 3 Russ. 565, and 2 Moore & Payne, 127; 10 Barn. & Cress. 564, nom. *Cockerell v. Cholmeley*, 1 Russ. & Myl. 418; 1 Clark & Finnelly, 60. See *Doe v. Phillips*, 1 Adol. & Ell. N. S. 84.

(u) 2 Swanst. 149 n.

(v) 3 Swanst. 699.

ber, for which he is not impeachable while he actually occupies the land, and his executing a power to sell. In the latter case he is not to have the value for himself.

66. In delivering judgment in error in B. R. in the case of Cockerell and Cholmeley, the Court observed, that they did not treat this as a case of fraud, but as a case of failure of compliance with that condition on which alone the uses mentioned in the testator's will could be revoked and the estate be applied to other uses. It had been contended that the revocation might be good under the power, although there had not been a good and valid sale according to the power. The argument as to that point was founded principally on the observation, that the old uses might be revoked by one deed, and the land conveyed and new uses created by another which certainly might be according to the language of the will. But looking at the whole of the language of the power contained in the testator's will, it appeared to be perfectly clear that there could be no valid revocation of the uses mentioned in the will, unless that revocation was made to the end that a conveyance might be made of the land. That must be the object of the revocation.(x) It must then be seen, looking at the whole of this deed, whether the object of the revocation was a conveyance of the land. Now it appeared by the contract previous to the revocation, and also by the deed of conveyance, that the trustees contracted to sell the land for a certain specific sum of money; and the tenant for life, by the same instrument and contract, contracted to sell the timber, fruit and other trees, wood [*490] and under-wood growing; and when the *contract was executed by the deed of revocation and conveyance, the trustees conveyed the land in consideration of one sum of money, and the tenant for life conveyed the timber-trees, wood and under-woods, in consideration of another sum of money paid to him. It was said that this might be lawfully done, because the tenant for life, without impeachment of waste, might at law have cut down all the timber-trees and underwood. It was not material to consider whether he could by law have cut down trees to the extent of those which he had sold, because their opinion was that according to the terms of the testator's will, if the tenant for life thought fit to consent that the estate should be sold, he was bound to

suffer it to be sold in the state in which it was at that time, and not to sever from it the timber or other trees, but let the whole go together. There would then be one entire sum to be received for the whole, which would be applied to the interest of the tenant for life as to part, and the person taking the remainder after him would be entitled to the residue. It is said that this mode of dealing with the estate was beneficial for the family; because, if the tenant for life had cut down the timber first, the estate to be sold afterwards would have fetched much less money. That probably might be so. But the testator clearly meant, if the tenant for life consented to the sale, he should allow the estate to be sold with all that was on it as it then stood. This is the ordinary sense and meaning of the words "sale of an estate." Though in estimating the price the land and timber are sometimes valued separately, yet the whole sum is paid at once, and is considered as one price. That was what the testator intended. His intention not having been complied with, the power had not been well executed, the uses had not been revoked.

67. In the case of *Doran v. Wiltshire*, the tenant for life was held entitled to the money produced by the sale of timber cut before the sale under the power, but not to the timber standing, although of small value, and he had built a house worth 3,000*l*. *The power of sale was in the trustees, with [*491] the consent of the husband and wife. In the case in the House of Lords the power was in the husband and wife, with the consent of the trustees, but that of course does not vary the right.

68. Where an estate charged with incumbrances descended to three sisters, and each of two of them devised her one-third in strict settlement, with a power in one will, if at any time before the incumbrances should be paid off it should be thought necessary to sell and dispose of all or any part of her estates, to the trustees, with consent to sell all or any part of the estates, and a power in the other will to the trustees to sell or mortgage, with consent, if they thought it advisable to raise by sale or mortgage of all or any part of her estates any sum of money for the purpose of paying off all or any of the incumbrances; a decree was made for discharging the incumbrances by sale of the estate, or a sufficient part thereof. The whole of the estate was sold, and more

moneys raised than were required. The Lord Chancellor, of course, treated the decree as binding whilst it stood. But he added, the power given to the trustees was to sell the whole or such part as might be expedient. The Court has decreed in the same way, and the Master, with the consent of the parties interested, has sold the whole. The purchaser, by whom the objection was made, could not, he held, come in to object to it.(y)

69. In a case which was not discussed,(z) a sale under a power of sale and exchange in a will was made available for the payment out of the purchase-money of the testator's debts, which were directed to be raised by sale, lease, or mortgage of a 1,000 years' term, limited by the will, and which term would have been overreached by the execution of the power. The estate was sold,

with an intention to lay out the purchase-money in [*492] other estates, which estates of course would have been limited to the trustees of the estate sold for 1,000 years to pay the debts, and they could only have sold the term and not the inheritance. But the fee of the estate having been sold under the power, was in this way made a fund for the payment of the debts. As a reversion, after a term of 1,000 years, is only of a nominal value, no substantial injury is done by such an application of the price of the fee ; but it is not safe to accomplish indirectly by a power what it does not authorize to be done directly.

70. It was formerly a very considerable question, whether a tenant for life, with a power of sale and exchange in himself, or to the execution of which his consent was required, could buy the estate himself, or take it in exchange for an estate of his own. As to an exchange, it was insisted that the power meant an act that bore as near a resemblance to a strict legal exchange as possible ; and therefore there must be two different persons to reciprocally exchange, which there could not be where the tenant for life had the power himself. And in regard to the general question, it was doubted whether at least equity would not relieve against the execution of the power. Of course, an exchange under a power cannot have all the properties and ingredients of

(y) *Lutwych v. Winford*, 2 Bro. C. C. 248.

(z) *Fletcher v. Houghton*, 5 Ves. jun. 550.

legal exchanges, nor is it necessary it should.(a) But upon the ground that the word *exchange* in the power means an act that bears as near a resemblance to strict legal exchanges as possible, Mr. Booth thought there must be reciprocal acts of exchange between *two different persons*, and therefore that a tenant for life to whom a power of exchange was given, under the control of others, could not exchange with himself. Sir D. Ryder and Mr. Filmer were of a contrary opinion, and even Mr. Booth thought that the exchange might be made circuitously under the power.(b) Lord Eldon, although fully aware of the danger attending a purchase of the inheritance by a tenant for life, seemed to think "that it could not be impeached on general prin- [493] ciples.(c) A few years ago, however, the doubt was stated as a ground for requiring the aid of Parliament, in a petition for an act to enable an exchange of settled estates with the tenant for life, which it was conceived could not be done under a power of sale and exchange in the settlement. The Chief Baron, and Mr. Baron Hotham, to whom the bill was referred, reported, and submitted it as their opinion, that the doubt which was the cause of petitioning for the bill was not well founded; and therefore that the bill was unnecessary, and that the passing of such a bill might cause a great prejudice to numerous titles under executions of powers of sale and exchange of a similar kind; and the House of Lords accordingly rejected the bill; in consequence of which many estates of great value have since been purchased, and taken in exchange by tenants for life, under the usual powers of sale and exchange.

71. The point, however, was again agitated in practice, but it was at last set at rest by the decision of Lord Eldon in favor of the validity of the execution of the power in the late case of *Howard v. Ducang*.(d) He said, that the cases in which he had expressed his disapprobation of tenants for life having been permitted to purchase the settled estates had been cases where the property had been sold under the direction of the Court; when a sale takes place in the Master's office, the tenant for life is the

(a) See 1 Madd. 224.

(b) 2 Cas. & Opin. 94. See Gilb. Uses, 179, note.

(c) See 9 Ves. jun. 52; and 11 Ves. jun. 480; but see ib. 476, 477.

(d) Turn. & Russ. 81.

only person who knows anything about the value of the estate, and he therefore buys at a great advantage; but there was a difference between that case and the present, for here the consent of the tenant for life was not all that was necessary; there must be a diligent attention on the part of the trustees to see that they get a reasonable price. There might, undoubtedly, be cases in which more might be obtained from the tenant for life than from any other person, and if practice had sanctioned such [*494] transactions as the present, he would not disturb them.

He then referred to the practice of conveyancers, to which he thought great weight should be given, but he intimated that he should have said originally that it would not do.

72. In the later case of *Grover v. Hugell*,^(e) the Master of the Rolls was of opinion that a purchase by a rector in the name of his curate of land sold for the redemption of land-tax was valid at law. But he said the rule in equity is that a man cannot place himself in a situation in which his interest conflicts with his duty. The duty of the rector was to obtain the best possible price for the land sold, and his interest as purchaser was to pay the least possible price for it. The case of *Howard v. Ducane*, where it was held that trustees for sale, with the approbation of the tenant for life, may sell to the tenant for life, does not furnish a general principle. Lord Eldon expressly put the case upon the practice of conveyancers, which he did not think it safe to unsettle, and stated that he should have said originally it would not do. The Master of the Rolls considered the title bad, and rescinded a contract for sale of the estate.

73. We may here again remark, that if an estate be directed to be sold, and another estate to be bought with the money, over which latter a power of appointment is given, the power may in equity be exercised over the estate directed to be sold, so as to operate upon the estate directed to be purchased.^(f)

74. It may here also be proper to notice, that a tenant for life to whom a power of sale is given, or whose consent is requisite to its execution, cannot by an exercise of his power defeat any estate which he has previously created out of his life estate, for he is not

^(e) 3 Russ. 428.

^(f) *Bullock v. Fladgate*, 1 Ves. & Bea. 471; *supra*, vol. 1, p. 513.

permitted to defeat his own act,(g) although originally it might with propriety have been held, that where the interest created was only by way of security for money, it was [*495] defeated as to the settled estate, but of course transferred to the estate directed to be purchased. This would have been a sound distinction between a general power of revocation for a man's own benefit, in which case clearly his previous grant ought to bind the estate, and a common power of sale and exchange, where the money is to be laid out in another estate, to be settled in like manner. The rule of law requires a purchaser to ascertain what incumbrances the tenant for life has created before he accepts a title under the usual power of sale.

75. Where a lease has been properly granted under a power in a settlement, and the estate is afterwards sold under a power of sale in the settlement, the purchaser, as we have seen, takes subject to the lease, which is not overreached by the subsequent exercise of the power of selling.(h)

76. And even where a tenant for life has created a lease beyond the range of his own estate, and not warranted by any power in the settlement, yet if a purchaser take the estate under a power of sale, to the exercise of which the concurrence of the tenant for life is necessary, and have notice of the lease—and possession by the tenant is notice of his interest—he will be bound by it, and if it rest *in fieri* he will be compelled to grant it.(i)

77. But where a new modification only is made of the estate subject to the power of sale in the settlement, that power may be executed, notwithstanding the new settlement, and so as to overreach the uses of both the settlements. In the case of *Roper v. Halifax*(k) there was a settlement, with a power of sale to trustees, with the consent of the tenant for life. A [*496] recovery was suffered, in which the tenant in tail only was vouched, which was to enure, to confirm the estates previous to the estate-tail, and the powers annexed to them, and subject

(g) *Goodright v. Cator*, Dougl. 460.

(h) *Vide supra*, vol. 1, p. 45.

(i) *Taylor v. Stibbert*, 2 Ves. jun.; *supra*, p. 367.

(k) *C. B. T. & M. Terms* 1816. MS. Appendix, No. 3, for a sketch of an argument written by the Author in favour of the destruction of the power. The case being now reported in 8 Taunt. 845, the report in the Appendix in former editions has been omitted.

thereto, to the joint appointment of the father, tenant for life, and son, tenant in tail under the settlement. The deed making the tenant to the precipe contained the 100,000*l.* clause, as it is called; and the estate was vested in the tenant to the præcipe for the joint lives of him and the tenant for life only. The father and son made a joint appointment (subject to the aforesaid estates and powers,) to new uses; and the trustees, and the father and son, conveyed (subject as aforesaid) to new uses, recapitulating the old ones previously to the estate-tail, and new powers of sale, &c. were given. It was held, that the power of sale under the original settlement was not destroyed by the recovery or by the new settlement.

78. We may in this place observe that purchasers under such a power are entitled to relief in equity against any defect in the execution of it, unless, as in the case of *Reid v. Shergold*, the substance of the power is not pursued, or the execution was fraudulently obtained, as in *Doe v. Martin*.(1)

79. We have had occasion to notice the operation of a proviso, authorizing the owners to receive the rents till sale of an estate conveyed to trustees to sell.(m) In a very recent case,(n) a man surrendered a copyhold to a trustee in fee, upon the trusts declared by a certain deed for securing 200*l.* and interest. By a deed between the parties, it was declared that the trustee should be seised of the estate upon trust to re-surrender, if the money and interest should be paid at a day named; but if default should be made in payment, then upon trust at any time thereafter, when the lender, his executors, administrators, or assigns, should think proper, to sell the estate, &c.; and the surrenderor [497] *covenanted that the estate should be to the use of the trustee in fee upon the trusts, &c. before declared, and for quiet enjoyment, free from incumbrances. Default having been made in payment of the money, the trustee, without having been admitted, entered; and in trespass *quare clausum fregit*, the special matter was pleaded by the defendants, and the plaintiff demurred specially. The plea stated an entry by virtue of the indenture, but not that the entry was for the purpose of selling,

(1) Vide *supra*, ch. 10.

(m) *Supra*, vol. 1, p. 153.

(n) *Watson v. Waltham*, 2 Adol. & Ell. 485.

or for any specified purpose. The question, it was said, was, whether the covenant for quiet enjoyment operated merely to warrant the title of the trustee as such, or of itself, that is independently of the estate of the trustee, gave him a power to do the particular act. The Chief Justice observed, that the plea did not state that the entry in question was made for the purpose of selling, nor was it necessary for that purpose that an entry should be made. At all events the power given was only to sell when the lender should think proper, and it was not averred that he did so. Till that happened, the case in which the power was to be executed did not arise. He at first thought that the covenant for quiet enjoyment might be looked at as unconnected with the rest of the deed, but that covenant is expressly stated to be upon and for the trusts, intents and purposes before declared. The other Judges appear to have thought that the trustee might have entered if he had been admitted, and that although there had been no admittance, the power contained in the deed and the covenant for quiet enjoyment would have been a sufficient defence but for the qualification introduced as to the lender. His thinking proper to have the estate sold was a condition precedent: had it not been for that limitation, the trustee, who had a *quasi* legal estate, might have sold, and might have justified entering, that he might more conveniently hold and enjoy the premises for the purpose of the deed. But that was prevented by the condition; and therefore, as the plea did not show that the lender thought proper *to require a sale, the power did not appear to have [*498] been followed so as to afford a justification of the trespass. But an application to amend, by putting on the record a request by the lender, was refused. The Lord C. J. said he could not assent to that. One of his grounds of decision was, that the power to sell did not imply a right to enter and turn persons out. An entry might be made, and no purchaser ever found. The Court therefore did not agree in opinion.

80. This is a case which frequently occurs in practice, and it is highly desirable that the true rule should be fixed. It admits of no doubt, that if the trustee had been admitted, he might have entered and turned out the occupants, although no purchaser might ever be found; for the legal estate would carry the right, and possession is necessary before an attempt to sell, with the

view as well to the preparation for a sale, as to the ability of giving quiet possession to a purchaser after a sale; and if in such a case no sale can be effected, clearly the rents and profits, that is the estate, must answer the money secured, without a sale. And the covenants go with the estate, and the borrower, if the trusts are not duly performed, must seek his remedy in a court of equity. The opinion of the L. C. J. would appear to deny to the trustee, even after admittance, a right to enter before a sale; but probably that is not the meaning of his concluding observation, although the words are, that *the power to sell* did not imply a right to enter and turn persons out: an entry might be made, and no purchaser ever found. The observation is not, that the covenant, before admittance, did not warrant an entry: of course the operation of the power or trust to sell was not varied by the want of an admittance, although an admittance would be necessary to the completion of a sale.

81. As regards the necessity of an admittance to justify an entry in such a case, the surrender gives a title, except as against the lord, although the possession remains with the surrenderor; [*499] but the covenant that the estate should forever thereafter remain to the trustee in fee upon the trusts, and should be peaceably held and enjoyed, and the rents received accordingly, without any interruption by the surrenderor, might well be considered as including a license to the surrenderee to enter.(o) If this be the true view, the entry authorized ought perhaps to be deemed that which the estate warranted, and to which the continuing operation of the covenants would attach; and if so, the entry in the above case might have been justified upon the plea as it stood, for the trustee for this purpose would have the same right as if he had been admitted. The requisition of the *cestui que trust*, the lender, was properly a question belonging to another jurisdiction. The covenants embraced the possession and the fee from the execution of the deed; the trusts were to spring out of the interest thus secured to the trustee. They bound the trustee as trusts, but ought not, it should seem, to be held to operate as conditions qualifying at law the covenants of the surrenderor.

(o) See *Holdfast v. Chapham*, 1 Term Rep. 600.

*CHAPTER XIX.

[*500]

OF POWERS TO APPOINT NEW TRUSTEES.

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| 2. Where the power is authorized by articles. | 13. Where the trustee's discretion controlled by equity. |
| 3. How the power should be exercised in form. | 14. Upon a bill filed, there will be inquiry. |
| 6. Where the power contrary to the words, subsists after the death of all the trustees. | 15. Effect of appointment by trustees after suit. |
| 7. A continuing trustee within a power to the survivor. | 16. Provisions where trustee is lunatic, &c. |
| 8. Where the power distinguishes sets of trustees in classes. | 17. Where equity will appoint trustee. |
| 10. What number of trustees may be appointed. | 18. Where under 1 Will. 4, c. 60, s. 22. |
| 11. Bankruptcy an unfitness to act. | 19. Costs of trustees retiring. |
| 12. Where a new trustee should be appointed before the estate is sold. | 20. } Appointment of trustees for charities. |
| | 21. } ties. |
| | 22. Reference to Master. |

1. THE last power in settlements is usually that to appoint new trustees. This power generally expresses plainly the cases in which a new trustee is to be appointed, and it is seldom any difficulty arises either upon its construction or its execution.

2. In *Lindow v. Fleetwood*, (a) where a strict settlement was directed by a will, and that there should be inserted in it powers of leasing, sale, partition, and exchange, and that in such settlement should be inserted "all such other proper and answerable powers as are usually inserted in settlements of the like nature," a power to appoint new trustees was held to be a proper and reasonable power. Some reliance was placed by the Court upon the direction being "in a separate and distinct sentence; but that appears to be too slight a distinction.

3. All old power of appointing new trustees of real estate merely express that the trustees may convey to new trustees, and do not give express powers of revocation and new appointment

(a) 6 Sim. 152.

Sometimes the trustees are made merely to "appoint and convey" the lands to the uses ; or the like : the words of the power being followed with the addition of the word *appoint* ; and sometimes they are made to expressly revoke the uses of the settlement, and then to appoint to the new uses. Either mode will effectuate the intention.

4. The power of appointing new trustees now usually inserted in settlements, directs, that upon the appointment of a new trustee all such conveyances, &c. shall be executed as will effectually vest the estates in the old and new trustees to the uses of the settlement ; and declares, that every new trustee when appointed shall have the same powers, &c. as if nominated in the deeds. Now, it seems quite clear, that no more was originally intended by this power than that the trustees to preserve contingent remainders should transfer the estate limited to them for that purpose (which is a vested(*b*) remainder,) or any other estate actually vested in them, to the trustees, who would be enabled to exercise the different powers of sale and exchange, &c. created by the settlement, under the express direction contained in the deed, that every new trustee should have the same powers as the old trustee had. But it has become usual to consider it essential that the new trustees should have a seisin to serve the uses in the same manner as the old trustees had, although it does not always happen that the trustees of the powers are the persons seised to the uses, nor is it at all necessary that they should be. To raise this new seisin two deeds are necessary ; by the first, the uses of the settlement must be revoked, and the estate appointed to a stranger [*502] in fee, and the old trustees must join in conveying the estate to him, and then the stranger must re-convey (which he may do by indorsement) to the uses of the settlement, in the same manner as if the new trustee's name had been inserted therein. The power of revocation and new appointment is considered to be clearly implied by the declaration in the power, and supposing no such power to exist, yet the estates to preserve contingent remainders are effectually vested in the old and new trustees by the actual conveyance. This mode assumes that there is a seisin in the releasees to serve the uses, and that that

seisin is transferable, for otherwise it would not be necessary to defeat the old uses, and raise a new seisin in the old and new trustees to serve them. If it ever should become necessary to decide the point, there is little doubt but that it will be determined, 1. That the power only meant that the estate actually vested in the trustees shall be transferred to the old and new trustees, which may be done by one deed operating under the statute of uses: 2. That they may then exercise the powers created by the settlement: and, consequently, 3. That there is no seisin in the trustee to transfer, and therefore the revocation and appointment is nugatory and of no effect. Of course these observations do not apply to a case where the fee-simple is vested in the trustees. In that case, clearly, one conveyance only is necessary. The old trustees may convey by lease and release to the new trustee, to the use of himself and the old trustees in fee, upon the trusts.

5. Admitting that the usual power of appointment requires the seisin (if there be any) in the old trustees, to be vested in the new trustees, it will not be denied by the most strenuous supporters of this doctrine, that this ceremony is not necessary where the power expressly negatives that construction: the powers in the settlement, it is quite clear, may be executed by a person not having any seisin vested in him to serve the uses; therefore, to prevent the necessity of this artificial, circuitous mode of appointing new trustees, *it may be advisable to ex- [*503] pressly declare in the deed creating the power, that upon the appointment of any new trustee the estate of the trustees to preserve contingent remainders shall be conveyed to the continuing and new trustees; and that every new trustee may act in the execution of the powers, without being invested with the seisin (if any) in the old trustees to serve the contingent or future uses. The usual power of revocation and new appointment introduced into this power of appointing new trustees is, however, to be preferred, as its operation is now generally known: a circumstance which is in practice of infinitely greater importance than the expense of an additional deed.

6. In the late case of *Morris v. Preston*,^(c) it appeared that

(c) 7 Ves. jun. 547. See *White v. Parker*, 1 Bing. N. C. 573; 1 Scott, 542, where the legal estate passed. In *re Roche*, 2 Dru. & War. 287.

in a settlement powers of sale and exchange were given to the trustees to preserve contingent remainders. And there was a power, in case of the death of any or either of the trustees, for the husband or wife, or the survivor, *with the consent of the surviving co-trustee or co-trustees*, to appoint any new trustee or trustees, and upon such appointment the *surviving co-trustee* should convey the estate, so that the *surviving trustee and trustees*, and the new trustee or trustees, might be jointly concerned in the trusts, in the same manner as such *surviving trustee* and the person so dying would have been in case he were living. The purchaser objected to the title of the trustees under the power of sale, because they were not appointed until the death of *both* the trustees under the original settlement, which was not authorized by the power, but the objection was waived without argument. Now the power in terms clearly did not extend to the event which happened : it contemplated only an appointment on the death of one trustee, and not an appointment after the death of both ; but the ground on which the plaintiff's counsel

waived the objection must be, that the *intention* of the [*504] power was, that new trustees should *be appointed whenever circumstances might require it. Clear as this point appears to be, it is to be regretted that the opinion of the Court was not taken upon it. It has more than once happened, that what counsel have given up in argument the Court has enforced.

7. A power in a will, in case either of two trustees should decline to act to the *survivor* of the trustees, to appoint new trustees, authorizes the *continuing* trustee to appoint new ones ; but if both refuse to accept the trust, they cannot exercise the power.(d)

8. Where three different classes of trustees were appointed by will for three different purposes, first, R. Sharp, and R. L. Rice, as to 1,000*l.* ; then as to the rest of the personal estate, Mary Sharp, R. Sharp, and G. A. Davis ; and then as to the real estate, R. Sharp and G. A. Davis ; and the will then contained a power, that in case either of the testator's said trustees, R. Sharp and R. L. Rice, so far as applied to the trusts reposed in them

respectively, or the said Mary Sharp, R. Sharp, and G. A. Davis, so far as applied to the trust reposed in them respectively as aforesaid, should happen to die, or desire to be discharged from, or neglect or refuse, or become incapable, to act in the trusts thereby in them reposed, before such trusts should be fully performed or determined, in such case it should be lawful for new trustees to be appointed: It was held that these words plainly denoted that the two first trustees were to be distinguished as a separate class, and the second sentence, which applies to the other three, had the same confined meaning; the whole power, therefore, was given to the persons named in classes, and no power at all was given to the third class, who were not named.(e)

9. Where a daughter was entitled to a sum, secured upon her father's estate, and by her marriage articles for a settlement, *it was agreed that there should be in the set- [*505] tlement a power enabling the father, his executors or administrators, to invest the money in the usual securities, in the names of *trustees to be for that purpose appointed*, and for the trustees from time to time, with the consent of the husband and wife, or the survivor of them, or of their own authority, to change the securities, and the income was to be paid to the husband for life, and then to the wife for her separate use for life, and then the principal to the children; it was held that the wife, after the death of her husband, could not appoint trustees. It was considered that the trustees in the first instance, ought to have been appointed by the husband and wife jointly, and the clause as to the consent of the husband and wife, or the survivor, being *after the payment*, was treated as excluding such a power before that event.(f) It may, however, be thought that that clause afforded a solution of the difficulty by whom the trustees were to be appointed, in respect of which the deed was silent; and this was further pointed out by the trusts themselves, which gave the interest of the fund to the survivor for life. It was considered that the father's concurrence in the appointment was not necessary.

10. And although in words the trustee is only to appoint some other person to succeed him, yet it is said he may appoint more

(e) *Sharp v. Sharp*, 2 Barn. & Ald. 405; and see *Smith v. Leigh*, 6 Moore, 214.

(f) *Brasier v. Hudson*, 9 Sim. 11.

than one.(g) But it has been held, that a greater than the original number of trustees is invalid.(h)

11. If the power is to appoint a new trustee in case any of the trustees should become incapable or unfit to act in the trusts, the bankruptcy of a trustee would be an unfitness.(i)

12. We have already seen in what cases the assignee or real or personal representatives of a trustee or a power will have the discretion which was reposed in the trustee himself,(k) and likewise in what case surviving trustees cannot execute a [*506] power without the concurrence of the heir of the deceased trustee.(l) The latter cases bear upon the doctrine which we discussed in the last chapter, inasmuch as they point out the necessity of appointing, under the power in the settlement, a new trustee in the room of the deceased trustee, before any attempt is made to exercise the power of sale and exchange. The power would be badly executed if the surviving trustees acted alone: and after what fell from Lord Eldon, in *Hall v. Dewes*, a good title might not be made, if even the heir of the deceased trustee concurred with the surviving trustees.

13. The discretion of a trustee of a power, as we have seen, is not restrained by equity, where he is acting *bona fide*. But although a trustee have the fullest power to nominate a new trustee, who is to be highly remunerated, yet upon a bill filed equity will control the act. His power to appoint a trustee does not, Lord Eldon said, at all affect the control of the Court over his discretion, though it imposes upon the Court a duty more especially to take care that its own discretion is wisely exercised; for when such a remuneration is given to the new trustee, no one motive ought to operate upon the old trustee in the appointment but to do the very best thing, not for himself, or the person whom he is to appoint, but for those whose interests they are to take care of. There is no doubt, therefore, of the control of the Court over his discretion. *It does not prevent the exercise of his discretion, but takes care that it shall be duly exercised.* In the

(g) *Sands v. Nugee*, 8 Sim. 130.

(h) *Ex parte Davis*, 2 You. & Coll. C. C. 468.

(i) *In re Roche*, 2 Dru. & War. 287.

(k) *Supra*, vol. 1, p. 147.

(l) *Supra*, vol. 1, p. 142.

ordinary cases, trustees, parties to the suit, will not be allowed to change the trustees without the authority of the Court.(*m*)

14. And although trustees with such a power may appoint whom they think proper, yet if they will not do so without going into a court of equity, the Court will not appoint a person upon their nomination without a previous inquiry.(*n*)

*15. If after a bill filed to have new trustees appoint- [*507] ed, the old trustees appoint new ones of their own authority, the act is not altogether void, but it puts the burden upon them of proving, and that by the strictest evidence, that what they have done was perfectly right and proper, and also imposes upon them the necessity of paying the costs of such proof. If the appointment is not in the view of the Court perfectly right and proper, it will be set aside, and the trustees may be fixed with the costs occasioned by their act.(*o*)

16. Where there is a power to appoint new trustees, but the old trustee is a lunatic, although there is no inquisition, or an infant, or abroad, &c., the courts of equity have power under an act of parliament to obtain in a summary way conveyances and transfers of the trust property to new trustees to be appointed under the power.(*p*)

17. Where the settlement contains no power to appoint new trustees, equity will by force of its jurisdiction in a regular suit appoint trustees in proper cases; but the Court has no power to delegate its power, and therefore such trustees cannot be authorized by the deed to appoint others in their stead. Upon every occasion equity alone can fill up the appointment.(*q*) But where a will did contain a power to appoint new trustees, but it became inoperative by lapse, the Court in appointing new trustees authorized them to renew the trustees as if the power in the will continued.(*r*)

(*m*) *Webb v. Lord Shaftesbury*, 7 Ves. jun. 480. See *Millard v. Eyre*, 2 Ves. jun. 94; *Cafe v. Bent*, 3 Hare, 245.

(*n*) — *v. Roberts*, 1 Jac. & Walk. 251.

(*o*) *Attorney-general v. Clack*, 1 Beav. 467.

(*p*) 1 Will. 4, c. 60. See s. 11. In re *John Welch*, 3 Myl. & Cra. 292.

(*q*) *Bayley v. Mansell*, 4 Madd. 226; *Southwell v. Ward*, 1 Tamlyn, 314; *Joyce v. Joyce*, 2 Moll. 276, where the power was by inadvertence introduced; *Brown v. Brown*, 3 You. & Coll. 395. See *Sampayo v. Gould*, 12 Sim. 426.

(*r*) *Howard v. Rhodes*, 1 Kee. 581. See *Greenwood v. Wakeford*, 1 Beav. 576.

18. Where there is such a disability in a trustee as enables an application to a court of equity to compel a conveyance, or transfer, although there is no power in the instrument creating the trust to appoint new trustees, yet the Court, where the [*508] recent creation or declaration of the trust, or other *circumstances, may render it safe and expedient, is empowered in a summary way to cause a transfer or conveyance to be made to new trustees.(s) This provision renders a suit unnecessary, even where there is no power in the instrument to appoint new trustees. But it is a discretion exercised with a great caution.(t) The power clearly extends to a case where the trustee is out of the jurisdiction, although it has been supposed,(u) but erroneously, that the Judge who decided Fitzgerald's case intended to express a contrary opinion.(x)

19. If a trustee, without a sufficient cause, retire from a trust which he has accepted, the Court will not allow him any costs;(y) indeed, the general opinion was that he would be compelled to pay the costs of the proceedings.

20. In cases of charity, a power of appointing new trustees receives a liberal interpretation;(z) and if there be no such power, equity of course will appoint new ones, and upon a proper scheme can authorize regular appointments to be made by proper parties, as occasion may require.

21. In consequence of the great expense to charities, where all the trustees of property were dead, in making out the title of the heir to the surviving trustee, the 1 W. 4, c. 60, s. 23, provided that where all the trustees of any estate for any charity, or charitable or public purpose, should be dead, the Court might in a summary way require, by advertisement, that the representative of the last surviving trustee do, within twenty-eight days, appear or give notice of his title to the trustee, *and prove his pedigree*,

(s) 1 W. 4, c. 60, s. 22.

(t) In re Nicholls, Lloy. & Goo. t. Sugd. 17; In re Fitzgerald, ib. 20.

(u) In re Lord Mayo, Lloy. & Goo. t. Plunket, 118.

(x) See in re Cloyne; the very order was made by the same Judge.

(y) White v. White, 5 Beav. 221.

(z) Attorney-general v. Pearson, 3 Mer. 412, 413. See Attorney-general v. Floyer, 2 Vern. 748; Doe v. Roe, 1 Anstr. 86; Foley v. Wontner, 2 Jac. & Walk. 248; Attorney-general v. Shore, Ch. 1834, 1835, 1836; Attorney-general v. Scott, 1 Ves. 413; Attorney-general v. Bishop of Litchfield, 5 Ves. jun. 825.

or other title as trustee; *and in default, the Court is [*509] authorized to appoint new trustees, and to cause a conveyance to be made to them of the trust property without the necessity of any decree.

33. Where the Court appoints a new trustee it is through the medium of a reference to the master; and the general rule is that the court gives credit to the Master's report of the appointment of trustees, unless the party complaining of it can show some objection to the persons who have been selected. (*a*)

(*a*) In the matter of the Norwich Charities, 2 Myl. & Cra. 275.



APPENDIX.

No. 1.

**Case in the reign of HENRY VII.(a)* [*510]

THIS case first came on in the 14th Henry VII. and is the last case reported in that year. In the King's Bench the case was such : A man had certain feoffees in his land to his use, and made his will, and willed that his lands should be sold after the death of one A., whom he willed to have the profit during his life ; which feoffees have enfeoffed others to the use to perform the will of the testator ; and if the second feoffees shall sell the land or not, that was the matter, Kings. *semble*, that the second feoffees may well sell the land.

This case came on again in Trinity term, in the 15th of Henry VII., and is in the year-book, fo. 11 b. A man enfeoffs A. and B. upon trust, and afterwards he makes his will, and recites that A. and B. were seised to his use, and that his will is, that the said A. and B. should make an estate to his wife for the term of her life, and the remainder to his son and heir, and to the heirs of his body begotten. And if the son should die without heirs of his body, then his will was that the aforesaid feoffees, should alien the said land, and that the money arising thereby should be distributed for his soul. Then the feoffor died, and the feoffees make a feoffment over to the same use, and declare their will that the second feoffees shall act according to the first will, &c.

(a) Vide *supra*, vol. 1, p. 45.

And the wife dies, and the son of the first feoffor dies without heir, and the second feoffees alien the land to a stranger in fee, and if this alienation was good or not, that is the matter. Per *Rede*, Justice. It seems to me that the second feoffees cannot make an alienation according to the will of the first feoffor; for the will of the man ought to be taken according to the intent of him who made the will, and according to the law of the land; for if a man makes his will, that the land of which he was seised shall be sold and aliened to I. S. after his death, &c. and then dies [*511] seised, there his will shall not be performed, because his will is contrary to the law of the land, to make a will of land of which he was seised, and died seised; *quod fuit concessum per Tremeale*. And so if a man has feoffees upon confidence in his land, and makes his will, that one I. S. shall alien his land, and there is no such person in *rerum natura*, there his will is void, because no other man can sell that; and, for that reason, the feoffees shall be seised to the use of the heir, &c. because it appears by the will that no other man shall interfere with the alienation. And so also if a man has feoffees in his land, and makes his will that I. N. shall alien the land; there, if I. N. dies without heir, his executors shall not alien, because that is not warranted by the will; but the feoffees shall remain seised to the use of the heir of the first feoffor. And so it is where he names the feoffees from the first in the will, and then he says, the aforesaid, &c. feoffees shall alien the land for his soul; the authority is solely given to them, and their executors cannot alien this. But if these feoffees make a feoffment over to the same use, yet the first feoffees may alien the land according to the will of the first feoffor: *quod fuit concessum per Fineux et Tremeale*. And also the second feoffees may alien the land by the commandment of the first feoffees, and that is good, for it is the sale and the alienation of the first feoffees in law. And no one will deny that the second feoffees cannot alien the land during the life of the first feoffees, if it be not by their commandment; so that it be, in fact, their alienation; and by consequence no more can they sell after the decease of the first feoffees. *Tremeale* to the same purpose. And there is a diversity where the will is that the alienation shall be made to a person certain; and where it is that the alienation shall be made generally; for if the will was, that the aforesaid

feoffees alien to one I. S., there, if they make a feoffment over to the same use, yet the second feoffees shall make this alienation, for there is in a manner an use to I. S. : *quod fuit concessum per Rede et Fineux*. But when the will is, that the aforesaid feoffees shall alien, there the authority is solely given to them : for if his will was that his executors shall alien his lands, although they refuse to alien, yet the feoffees cannot alien. So if his will was that the feoffees shall alien, and they will not, but die, yet the executors cannot alien. And so it is here. Fineux, Chief Justice, to the same purpose. And so if a man makes not a will, the common law makes a will for every man, as to his lands and his goods, and that is, so that the heir shall have the land, and the ordinary the goods. But if a man is desirous that his land should be aliened in another manner to that which [512] the common law ordains, then the common law suffers him to make his will of them. And every will which a man makes ought to be construed and taken according to the purport of the words ; or as it may be implied and understood by the words what his intent was. Therefore here, when he recites the names of the feoffees, and then says that the aforesaid feoffees shall alien, &c., there it is as much as to say in effect that no other shall alien except them. And if the will was that the aforesaid feoffees should alien within the two years next ensuing, if they do not do so they cannot do it afterwards, but the heir of the feoffor shall have the land for ever. And if a man makes his will that I. S. shall have his land *in perpetuum* for his life, there by that he shall only have it during his life ; for these words " during his life," abridge the interest given before. And so here, when he says the aforesaid feoffees shall alien, there no other can have that power but only them. And there is a diversity where the power given to the feoffees is annexed to the land, and where not ; for if the will be, that the aforesaid feoffees shall make an estate over to a certain person for certain years, there, if they make feoffment over to the same use, the first feoffors cannot do that, for that power is a thing annexed to that land, which no one can do but he who has the land. But here the will was, that the aforesaid feoffees shall alien the land, &c. and that may well be done after the feoffment made by themselves to the use : and therefore their power is not determined by their feoffment. And if a man has

feoffees upon confidence in his land, and makes his will that his feoffees shall alien his land, to pay his debts, there the creditors shall compel the feoffees to alien, &c. : *quod fuit concessum per Rede et Tremeile*. And so if the will was that a stranger shall alien this land to one I. S., there I. S. shall compel this stranger by *subpana* to alien this land to him; and the feoffees cannot alien. But if the will was, that the feoffees shall alien his lands for money to distribute, &c. (*in pios usus*,) there no man can compel them to make an alienation, &c.; for no one is damaged, although the land be not aliened, and so there is a diversity : *quod fuit concessum*. And if a man has feoffees upon confidence, and makes a will that his executors shall alien his lands, there if the executors renounce administration of the goods, yet they may alien the land, for the will of land is not a testamentary matter, nor have the executors to interfere in this will, except so far as a special power is given to them. And if a man has feof-

513] fees in his land, and makes his will that his executors shall sell his land, and then he does not make executors, there the ordinary shall not meddle with the land nor the administrator neither, for the ordinary has only to meddle with testamentary matters, as of goods; and consequently no more can the administrator, who is but his deputy. And, therefore, it was lately adjudged in the Exchequer chamber by all the Judges of England. that if a man makes a will of his lands, that his executors shall sell the land, and alien, &c. if the executors renounce administration and to be executors, there neither the administrators nor the ordinary can sell or alien, &c. ; *quod nota*. *Quod fuit concessum per Rede et Tremeile*, for good law. And if a man makes his will that his executors shall alien his land, without naming their proper names, if they refuse the administration, and to be executors, yet they may alien the land : *quod fuit concessum per Fineux et Tremeile* for clear law ; *Rede non dedit*. And if a man makes his will, that his land which his feoffees have, shall be sold and aliened, and does not say by whom, there his executors shall alien that, and not the feoffees, *per Rede, Tremeile, et Frowik*. *Fineux* said nothing to this this day; but the day before, he in a manner affirmed this. *Conisby* said that the feoffees shall alien this, for they have the confidence placed in them, &c. But this was denied, for executors have much greater confidence placed in

them than the feoffees have, for the money to arise by the sale of the executors shall be assets in their hands, and therefore they shall sell. *Fineux, Rede, et Tremaille* said, that if a man makes his will that his feoffees shall alien his land, before the alienation the heir may take the profits, and they are seised to his use; and if an alienation be not made by them, the heir shall have the land for ever.

No. 2.

Long v. Rankin.(b)

Dom. Proc. 12 June 1822.

LORD CHIEF JUSTICE ABBOTT.

My Lords,—In this case of *Crawford v. Rankin*, the question your Lordships were pleased to propose for the consideration of the Judges was, Whether according to the effect in the law of the several instruments and matters stated and found in the special verdict, the indenture of the 11th of April 1781, operated to demise, grant or limit the premises *therein [*514] contained, to David Gamble and John Rankin, their heirs, executors, administrators and assigns, for the lives of three persons therein named, and during the natural life of the survivor of them, or for and during the full space and term of thirty-one years, which lives or terms of years shall longest continue?

The Judges are of opinion that the indenture did operate to limit the premises therein mentioned to Gamble and Rankin, their heirs, executors and administrators, for the natural lives of the three persons therein named, and the survivor of them; and in case all the three persons should happen to die within the period of thirty-one years, then for the remainder of a term of thirty-one years, to commence and be computed from the date of the indenture.

As to one part of the question, it is fit I should refer your Lordships to the terms of the power under which the lease in

question has been granted. The power, so far as regards the present question, is a power to demise for any term or terms of years not exceeding thirty-one years, or for one, two or three lives, or for any term of years not exceeding thirty-one years, or number of lives not exceeding three lives ; (then there are certain qualifications not material to the present purpose.) Pursuant to that power the lease professes to be made: "To have and to hold the said demised premises, with all and every the rights, members, and appurtenances thereto belonging, or in anywise appertaining, unto the said David Gamble and John Rankin, their heirs, executors, administrators and assigns, from the 1st day of November last past, for and during the natural life or lives of John Decryn, son of John Decryn of Enniskillen, merchant, aged about years, and the natural life of William Gamble, aged about seven years, and the natural life of Jonas Gamble, aged about four years, the two last mentioned being the sons to David Gamble (party hereto.) or for and during the natural life of the survivor or longest liver of them, or for and during the full term and space of thirty-one years."

My Lords, the form of this lease, as regards the term for which the tenements are to be holden, is unusual, and scarcely known in England, but it was stated by one of your Lordships, well acquainted with the form of leases in Ireland, to be common in that country ; we think the language of the power must be understood with reference to the prevailing practice, and we think the language of the lease is conformable to and warranted by the power ; and we see nothing repugnant in itself, or contrary to law in such

a limitation. Grants, or leases for the life of one or
 [*515] more persons, and of the survivor of them, *and for a term of years to commence at the death of the survivor, are not unknown in England, and their legality has not been questioned ; and as to any consequences that may happen to occur by the death of the lessee, or of the persons for whose lives the leases may be made, with a view to the person in whom the interest may vest by the operation of law, there does not appear to be any greater difficulty in one class than in the other ; upon this point, therefore, I conceive it to be unnecessary to trouble your Lordships further.

The validity of the lease to Gamble and Rankin, considered

with reference to the fact, that before the time of the making thereof Robert Crawford, who is therein named as the lessor, had executed certain deeds affecting the legal estate, which he took in the premises under the settlement of 1761, is as we understand, the important part of the question proposed to us by your Lordships. For the explanation of this part of the question it is necessary to refer to the several deeds and facts that are found by the special verdict.

It is found that by virtue of deed of 1761, Robert Crawford, by indentures of lease and release, bargained and sold to the said Barry Maxwell and John Chaloner, and their heirs, they then being in actual possession thereof, the lands aforesaid mentioned in the said declaration, to, for, and upon the uses declared and specified in the said last-mentioned indenture, that is to say, to the use of the said Jason Crawford for the term of his natural life, without impeachment of waste, and with full power to commit waste, with remainder to the said Andrew Crawford and Ralph Crawford, parties to the said indenture, and their heirs, during the life of the said Jason Crawford, upon trust to preserve contingent uses therein limited from being barred or destroyed, but yet so as to permit and suffer the said Jason Crawford and his assigns to receive and take the rents, issues and profits of the said lands to his own use, during the term of his natural life, with remainder as before to Robert for life, and to trustees during his life, to preserve contingent remainders; then after the decease of Robert, to the use of the first son of the said Robert Crawford, and the heirs male of the body of such first son lawfully begotten or to be begotten; and for the want of such issue, to the use and behoof of the first, second, third, fourth, fifth, sixth, and seventh, and all and every other the sons of the body of the said Robert Crawford, to be begotten severally one after another, as they and every of them, should be in seniority of age and priority of birth, and of the several and respective heirs male of the several and respective bodies of such son and sons lawfully *to be begotten, the elder of such son and sons, [*516] and the heirs male of his and their body and bodies lawfully issuing, being always to be preferred, and to take before the younger of such son and sons, and the heirs male of his and their body and bodies respectively issuing: and for the want of such issue

to the use of the daughters of the said Robert Crawford, as tenants in common, and the respective heirs of the bodies of such daughters; and in default of such issue, remainder to John Crawford, second son of the said Jason, for and during the term of his natural life, without impeachment of waste, remainder to the said Andrew Crawford and Ralph Crawford and their heirs, during the life of the said John Crawford, upon trust to preserve the contingent uses therein limited from being barred;" and then, my Lords, there are these terms, "Provided always, that it shall and may be lawful to and for the said Jason Crawford, and Robert Crawford, and John Crawford, and Ralph Henry Crawford respectively, when and as they shall respectively be in the actual possession of the said lands, tenements and hereditaments, hereinbefore granted by virtue of the limitations aforesaid, and not before, by any writing or writings under their respective hands and seals, attested by two or more credible witnesses, to make any lease or leases of all or any part of the said lands, tenements, hereditaments and premises, to any person or persons whatsoever, for any term or terms of years not exceeding thirty-one years, or one, two or three lives, or for any term of years not exceeding thirty-one years, or number of lives not exceeding three lives." Then there is this proviso, "So as such lease or any leases be made to commence in possession and not in reversion, or at a day to come, and be not made without impeachment of waste, and so as upon all and every such lease or leases to be made there be reserved yearly, payable during the continuance thereof, the best and most improved yearly rent which at the time of the making thereof can or may be gotten for the same, and so as no fine or sum of money, or other thing in lieu of a fine or sum of money, be taken for making such lease or leases."

The special verdict further finds, "That Robert Crawford, being seised as aforesaid, by certain indentures of lease and release, bearing date on the 13th of March, 1772, made between the said Robert Crawford of the one part, and John Dawson Coates, George Simpson and William Wilde, of the other part, gave, granted, bargained, sold, released and confirmed unto Coates, Simpson and Wilde, all the lands in question, together with all and singular the rents, members and appurtenances, and
[*517] so on, unto said Coates, Simpson and Wilde, *and the

survivor and survivors of them, and the heirs and assigns of such survivor, for and during the life of the said Robert Crawford, to the use of the said John Dawson Coates, George Simpson and Robert Wild, and the survivors and survivor of them, his and their heirs and assigns, for the life of the said Robert Crawford, in trust to and for the several uses and purposes following, that is to say, thereby and thereout in the first place to reserve and pay to the said Coates, Simpson and Wilde, and the survivors and survivor of them, their heirs and assigns, yearly and every year during the life of the said Robert Crawford, the sum of 60*l.* sterling, clear above all deductions and outgoings whatsoever, by two equal half-yearly payments in each and every year, during the life of the said Robert Crawford, and from and after the payment thereof, and subject thereto, then to pay over the remainder of the rent arising out of the said hereby granted lands, from time to time, under the order of the said Robert Crawford ;” and then he covenants with them that a yearly rent of 80*l.* clear above all deductions and outgoings whatsoever, shall be paid by rent reserved out of the hereby granted premises on every first day of May and first day of November in each and every year during the life of the said Robert Crawford, by two equal portions, unto the said John Dawson Coates, George Simpson and William Wilde, and the survivors and survivor of them, his and their heirs and assigns.

There is also another covenant in this deed of release, which it is necessary for me to draw your Lordships’ attention to ; “ and the said John Dawson Coates, George Simpson and William Wilde, do hereby for themselves severally, and for their several and respective heirs and assigns, covenant and promise, to and with the said Robert Crawford, that in case the present lease of the said hereinbefore granted premises shall happen to expire during the life of the said Robert Crawford, that then it shall and may be lawful to and for the said Robert Crawford to demise and let the same to such person or persons, and for such term and time, as he shall think proper, with the consent of the said John Dawson Coates, George Simpson and William Wilde, or the survivors or survivor of them, his or their heirs or assigns, first had and obtained in writing, provided a yearly rent be reserved thereon, not less than the present yearly rent of 80*l.* sterling ;”

and it appears that notwithstanding the conveyance by Robert Crawford, still that Robert Crawford was to have the power of granting leases, according to the power reserved to him, with their consent, taking care to reserve not less rent than was reserved before.

[*518] The special verdict further finds, that on the 11th of April, 1811, Robert Crawford demised to David Gamble and John Rankin certain land, containing in the whole about 210 acres, to have and to hold the said premises, unto the said David Gamble and John Rankin, their heirs, executors, administrators and assigns, from the 1st of November last past, for and during the lives of three persons there named, or for and during the full term and space of thirty-one years, which lives or term of years shall longest continue, they the said David Gamble and John Rankin, their heirs, executors, administrators and assigns, yielding and paying therefor and thereout, yearly and every year during the said term hereby demised unto the said Robert Crawford, his executors, administrators and assigns, the yearly rent of 89*l*. Then there are all the covenants required in this lease, so that this lease is conformable to the power reserved in the indenture of 1761. It is further found, that this indenture was so made and executed by the consent of the said John Dawson Coates, George Simpson and William Wilde.

It further appears, that Robert Crawford died in 1788, and that the present ejectment has been brought by the person next in remainder, according to the limitations of the settlement of 1762.

My Lords, we are of opinion, that by the deeds granting the annuity in 1772, Robert Crawford had parted with the life-estate to which he had become entitled under the settlement; but nevertheless the life-estate originally vested in him was not destroyed by those deeds, as it might perhaps have been by a fine or feoffment purporting to convey the fee; an estate for his life still continued, though it was no longer vested in him; and by the deeds of 1772 an authority was reserved to him, as between him and the persons to whom he conveyed his life-estate, enabling him to grant leases with their assent, upon certain conditions as to the amount of the rent to be reserved. This authority is reserved in the form of a covenant on their part to permit him so to lease,

but we consider that form sufficient to effect the object of the parties, so far as they were concerned. Simpson, Coates and Wilde, the grantees of the life-estate, assented to the lease of 1781, and that lease is in other respects conformable to the authorities reserved by the covenant. Upon these facts it is obvious that both Robert Crawford the lessor, and the present defendants, the lessees, were estopped, at least during his life, from questioning the validity of the lease at law, and if Coates, Simpson and Wilde, had attempted to disturb the lessees, a court of equity *would have restrained them [*519] from doing so. It is true that Robert Crawford could not, after having conveyed his life-estate to Coates and others, derogate from the effect of that conveyance by an execution of his power; and the inability to derogate from a prior conveyance works what is usually called a suspension of a power. As, if land be granted to A. and his heirs, to such uses as B. shall appoint, and in the mean time to B. for his life, or any greater estate, here B. has a power to limit and appoint the uses for the fee; but if he makes a lease for years or for life, before he executes that power, common justice requires that he should not derogate from his own grant by a subsequent appointment of the fee, and his power, therefore, is suspended as far as regards the lease and the interest of the lessee, and his appointee must take subject to the lease. But the parts of this special verdict to which I have directed the attention of your Lordships show that the lease to the defendants was not in derogation of the estate granted to Coates, Simpson and Wilde, by the deeds of 1772, but rather in conformity to it.

The only question is, whether the lease, upon the death of Robert Crawford, became void as against the remainder-man, and we are of opinion that it did not; leases for years made in virtue of a power, are not derived out of the estate of the lessor. It is not essential to the validity of a leasing power, or of a lease granted in virtue of such a power, that the lessor should have any interest whatever in the lands demised; such powers are not unfrequently given to persons to whom no estate in the land is given. They are often and more often given to persons to whom as in the present instance a life-estate is also given. On such occasions they are more or less guarded according to the discre-

tion of the settler with provisoes as to rent and other matters for the benefit of the remainder-man, and so guarded, they are considered beneficial to the whole inheritance, and to all who may successively become entitled to portions of it, as providing the means of keeping the land continually in a proper state of cultivation. A leasing power given to a tenant for life is usually spoken of in our books as a power appendant to the estate of the tenant for life; and it is said that the estate of the lessee is in such a case derived out of the estate of the tenant for life, for such period of the term as he may happen to live. It would probably be more correct to say that it operates upon that estate, than to say it is derived out of it even during that period.

It is not necessary to say in the present case that a [*520] leasing power *may not by the terms in which it is given be inseparably annexed to the estate of the tenant for life as to become void and inoperative, if he parts with his estate, and transfers it to another. This probably may be so by the terms in which the power is given, because he who gives it may give it with what qualifications he pleases; but as I have already observed, it is not essential to the validity of such a power that it should be appurtenant, or annexed to any estate in the land. It is also immaterial to the remainder-man whether or not it be so annexed; his security depends upon the conditions and qualifications under which the power is to be executed, and not upon the estate or interest of the person by whom it is executed. If these are not duly observed the lease is void as against him; and if they are duly observed, it matters not to him whether the estate originally given to his predecessor continued vested in that predecessor at the time of granting the lease, or had been previously transferred to another person.

Many occasions arise in which it becomes important to the convenience of a tenant for life that he should transfer his estate to another; an execution of the leasing power after such a transfer cannot, for the reasons already given, be prejudicial to the remainder-man; and the reasons upon which such powers have been introduced show that it may be more beneficial to him that the leasing power should be retained, and continue to exist, than that it should be extinguished and annihilated. We ought not, therefore, to hold that such a power is extinguished by a transfer

of the estate unless we see clearly, in the language of the deed whereby the power is created, that the donor of the power intended inseparably to annex it to the life-estate given, and to a continuance of that estate in the identical person to whom it is given; and this brings me to the consideration of the particular terms wherein his power is created, "Provided always, that it shall and may be lawful to and for the said Jason Crawford, and John Crawford, and Ralph and Henry Crawford respectively, when and as they shall respectively be in the actual possession of said lands, tenements and hereditaments herein-before granted by virtue of the limitations aforesaid, and not before, by any writing or writings under their respective hands and seals, attested by two or more credible witnesses, to make any lease or leases of all or any part of the said lands, tenements, hereditaments and premises, to any person or persons whatsoever, for any term or terms of years, not exceeding thirty-one years, or for one, two or three lives, or for any term of years not exceeding ['521] thirty-one years, or number of lives not exceeding three lives, so as such lease or any leases be made to commence in possession, and not in reversion, or at a day to come, and be not made without impeachment of waste, and so as upon all and every such lease or leases so made there be reserved yearly, payable during the continuance thereof, the best and most improved yearly rent which at the time of making thereof can or may be gotten for the same, and so as no fine, or sum of money, or other thing in lieu of a fine or sum of money, be taken for making such lease or leases, any thing herein contained to the contrary thereof notwithstanding."

My Lords, this power is given to several who are to take in succession; and we consider the words "and not before," to be most important in the present case. For looking at the whole clause we do not find that the donor intended to annex the power to the estate; and we think all the words of the clause are best satisfied by construing it to mean only that every person to whom an estate for life is given may make leases after, though not before, the estate shall have once vested in him, and during its continuance, whether in him, or another deriving under him.

We have found no case in which the effect of a power worded like the present has come under the consideration of a court; and

in the absence of an authority we think the construction that I have mentioned is the proper construction of this particular clause.

One other observation only remains to be made, and that is this, a lessee is in law and reason considered as a purchaser, even if he takes at the best rent that the land be worth at the time, because he forms his engagements and regulates his affairs upon the faith of his lease, and often expends his money in the improvement of the land, in confidence that he shall reap the benefit of his expenditure by the enjoyment of his term. And the estate of a purchaser is not to be taken from him unless it be for some good reason, founded in justice, or in the plain intention and expressions of the original settler of the estate; we think no such reason is to be found in the present case.

LORD CHANCELLOR.—My Lords, as it will be necessary to communicate the substance of this opinion to some noble lords who were present on the argument, I move your Lordships, therefore, that this House do proceed to give judgment in this case on Monday next.

Ordered accordingly.

[*522]

** Wednesday 19th June, 1822.*

LORD CHANCELLOR.—My Lords, in the case of Long and Crawford your Lordships were pleased to propound the following question for the consideration of the Judges: “Whether according to the effect in the law of the several instruments and matters stated and found in the special verdict, the indenture of the 11th of April 1781, operated to demise, grant or limit the premises therein contained to David Gamble and John Rankin, their heirs, executors, administrators and assigns, for the lives of three persons therein named, and during the natural life of the survivor of them, or for and during the full space and term of thirty-one years, which lives or terms of years shall longest continue?”

Your Lordships have had the unanimous opinion of the Judges upon that question, and it does not appear to me that there is any thing further I could suggest to your Lordships. The result of that is, that as far as the matter depends upon the present question, this judgment ought to be affirmed.

My Lords, attending to the value of this question, and con-

sidering that the property affected is but small, and as this court has decided in the same way as the court in Ireland, it does not appear to me to be improper that the judgment should be affirmed, with 150*l.* costs.

My Lords, I do not enter into any discussion of the circumstances of the case, but I am a little anxious to say, that I desire it may not be understood that I have given any opinion whatever with respect to the decision of *Renn v. Buckley*.

No. 3.(c)

Sketch of an Argument in favour of the Destruction of the Powers, in Roper v. Halifax.

The first point is, that the powers were destroyed by the recovery.

The powers of sale and exchange were, with reference to the estates created by the settlement, *shifting uses*: Thus, take the settlement to be, to Mr. Bouverie for life; remainder to trustees and their heirs, during his life, to preserve contingent remainders: remainder to his son in tail, with remainders over, and with the power of sale and exchange. The use to be [*523] created by the power would be a *shifting use*; for the estate created by the execution of it, viz. the fee in the purchaser, would take place in derogation of the estates limited by the settlement: that is, they would cease, and the use of the fee-simple would shift, and become vested in the purchaser. The power itself therefore may, with sufficient propriety, be called a *shifting one*.

Now, suppose the estate to be limited in the manner above mentioned, but, instead of the *power* of sale and exchange, a clause to be introduced, providing, that upon payment by A. of 100*l.* the uses shall cease, and the fee vest in him, this is strictly a *shifting use*.

In the case last put, it is clear, beyond a doubt, that if a recovery be suffered by Mr. Bouverie and his son, before A. pay the 100*l.*, the *shifting* would be effectually barred. Indeed it is

so clear that a recovery will bar such shifting uses, that it is settled that estates may be made to shift at any time, however remote, where there is a regular estate-tail limited; because as the tenant in tail can by a recovery bar the estate-tail, and *also the shifting use*, there is no danger of perpetuity. *Nicholls v. Sheffield*, 2 Bro. C. C. 215.(1)

The doctrine goes farther. A recovery by tenant in tail will even bar a *condition* annexed to the estate-tail. A gift to A. in tail, determinable upon his non-payment of 1,000*l.*, with remainders over; A. suffers a common recovery before the day of payment of the 1,000*l.*, and does not pay the money, yet, because he was tenant in tail when he suffered the recovery, by that he bars all. See 1 Mod. 111, where this is laid down by Lord Hale; and see *Pullen v. Ready*, 2 Atk. 587.

If this be so, where the event upon which the use is to shift, and the person who is to take it, is marked out by the settlement, let us consider how the case stands, where, as in the present case, a power only is introduced in the settlement.

All the uses are created out of the original seisin, whether they are designated by the deed, or a power of designation is given to some person named in the deed; in this respect the uses are similar. And it seems to be wholly immaterial whether the shifting use is limited by the deed creating the primary use, or under a power in the deed. Thus, if a fee be limited to A., with a proviso, that if B. die in his lifetime, C. shall have the fee; A. takes a qualified fee, and without any power to defeat the shift-

ing use, which, on the happening of the event, will at [*524] once arise and take effect by relation out of the original* seisin. If a *power* be given to C., in the same event, to revoke the use to A., and limit it to B., on the execution of the power the use to B. would take effect in the same manner as if it had been inserted in the original deed in the place of the power. There is therefore no distinction between the cases.

Now put our case. We have seen that if the shifting use were limited by the settlement itself, the recovery would bar it; why should not the recovery have the same effect, where a *power* is given to raise a shifting use, which would take effect in deroga-

(1) See 2 Jarman on Wills, 729.

tion of the estate-tail? The *power* is for this purpose the same as a *use* expressly limited. It is unimportant, both to the persons taking under the shifting use and the tenant in tail, whether the estate-tail is to be defeated by a clause in the deed providing at once for the event, or by a clause giving another person a *power* to name the event. If the *event* provided for happen, or the *power* be exercised [as the case may be] *before* a recovery, the estate-tail will be defeated. If a recovery be first suffered, the use or power, whichever it is, will necessarily be defeated.

Try the point thus :

A limitation,

To the use of A. and the heirs of her body by a *Searle* to be begotten.

Provided, and upon condition, that if she do marry any but a *Searle*, that then it shall be

To J. S. and his heirs.

This case is put by Lord Holt, in Page and Hayward, as a case in which a recovery before the event would bar the gift over.

A limitation,

To the use of A. and the heirs of her body, by a *Searle* to be begotten.

Provided, and upon condition, that if B. sell the estate, and appoint it to a purchaser, then it shall be

To the purchaser and his heirs.

This is our case, and it is in no respect distinguishable from the one on the other side.

It must be kept in view, that *powers* cannot be compared with *conditions* at common law. Thus, in *Bullock v. Thorne*, Mo. 615, WALMESLEY, J. held that a lease for years does not suspend the power of revocation, if it be raised by way of use ; *otherwise, if it is of a condition annexed to an estate in possession*. And the Court held, that if one has a power of revocation entire, and he extinguishes or suspends the power in part, he may still revoke for the residue, if it be by way of use ; *but not so of a condition annexed to the land*.

*The circumstance of the tenant for life having in [*525] this case not intended to destroy his powers, is of no weight. The question is, what was the effect of the recovery ?

The reversion reserved to him was wholly unimportant ; because although *that* remained in him, yet the *powers* were overreached by the recovery. The 20,000*l.* clause is also of no effect

in this case; it would revest in him his estate for life. *That* the recovery never could *over-reach*, but it could not bring back with it the powers which the recovery *did over-reach*. A clause to this effect was originally introduced, in order to guard the estate for life against the incumbrances of the tenant in tail.

Upon the first point, then, the argument stands thus :

A shifting use, limited by the deed, would be defeated by the recovery, whatever was the intention of the parties.

A power is a shifting use, and must therefore also be defeated by the recovery.

And the circumstances of this case cannot vary the rule of law.

If it should be held, that *new* powers were, upon the intention, reserved or created by the recovery-deed, yet that would not help the title; because, such *new* powers could not over-reach the subsisting estates under the first settlement, which were not over-reached by the recovery.

Secondly,—If, however, the recovery did not destroy the power, yet the subsequent settlement effectually released it.

If the powers were not destroyed by the recovery, the estates after the recovery stood limited, To the use that Mrs. Bouverie might receive pin-money; remainder to a trustee for a term of years to secure it; remainder to Mr. Bouverie for life; remainder to trustees and their heirs, during his life, to preserve contingent remainders; remainder to Mrs. Bouverie for life; remainder to trustees, as before, to preserve; remainder to trustees for 500 years upon trusts; remainder to such uses as Mr. Bouverie and his son should appoint. In default of appointment, to the son in tail; remainder to the father in fee; with a power of sale in the trustees, and the survivor of them, and the *heirs and assigns* of such survivor, with the consent of Mr. and Mrs. Bouverie, or the survivor.

The trustees were Mr. Batt and Mr. Blake. In this state of things the deed of 1811 was executed.

By that deed the joint power of Mr. Bouverie and his son was exercised, and the estates were limited to the uses after [*526] mentioned; *subject “To the uses, estates, and powers, by the recovery-deed limited or confirmed antecedently to the joint power.”

This, of course, is immaterial. The power was expressly upon

its creation, as far as the parties could effect it, made subject to certain uses, estates, and powers, and therefore they could only execute the power subject to them. The effect must have been the same, whether the execution of the power had been expressed to be subject to the prior uses, &c. or not, because it was upon its creation made subject to them.

Then comes the second witnessing part of the deed, by which Mr. Batt, Mr. Blake, and Mr. & Mrs. Bouverie, convey the estates, *but subject, and without prejudice as aforesaid*, To the use that Mrs. Bouverie might receive pin-money; remainder to a trustee for a term of years to secure it; remainder to Mr. Bouverie for life; remainder to the trustees, and their heirs, during his life, to preserve contingent remainders; remainder to Mrs. Bouverie for life; remainder to the trustees, as before, to preserve; remainder to trustees for 500 years, upon trusts; remainder to Edward Bouverie the son, for life; remainders over; with a power of sale and exchange to the trustees, and the survivor of them, and the *executors, administrators* and assigns of such survivor, at the request of *Mr. Bouverie* during his life, and after his decease at the request of the tenant for life in possession, during his or her life.

Mr. Batt and Mr. Blake were the trustees. In regard to the conveyance being *subject as aforesaid*, that if it mean any thing, must mean, subject to such of the estates, &c. as the parties could *not* defeat by their conveyance; or it might mean, subject to the power which they had before exercised. It could not mean, subject to *all* the previous estates, &c.; because Mr. Bouverie and the trustees actually conveyed, and of course their conveyance necessarily passed, the estates vested in them: they could not have joined for any other purpose.

It is manifest that the parties *intended*, as far as they could, to defeat the old settlement, and to re-settle the estate. It is clear that the parties were competent to release the powers as well as to convey their particular estates. And it would defeat their intention, not to consider the settlement of 1811 as a release of the powers.

The intention of the parties to rest the title as far as they could on the last settlement, is manifest from several circumstances; viz.

1. The concurrence of the trustees, as conveying [527] parties, which "could not be necessary under any other view of the case. Their concurrence was in no wise necessary, if the old powers and estate in them were intended to be left untouched.

2. The re-limitation of the *old uses which had not been affected by the recovery*. This was not essential, and could only be done because the parties did not wish to have again recourse to the old settlement.

3. The insertion of a new power of sale and exchange. The *old uses not affected by the recovery*, were, we have seen, re-limited. But instead of *repeating the old* power of sale and exchange, a *new* one is introduced.

Is not this irresistible evidence of the intention of the parties not to save the old power? Can it be contended that the powers which would be co-extensive could be intended to subsist together, although they are to be exercised by different persons?

The *old* power might be exercised by the trustees, or the survivor of them, or the *heirs* or assigns of such survivor, with the consent of MR. and MRS. BOUVERIE.

The *new* power was given to the trustees, and the survivor of them, and the *executors, administrators* and assigns of such survivor, with the consent of Mr. Bouverie *alone*.

Are these powers which, with consistency, can ride over the same estate at the same time? If the trustees were dead, the *heir* of the survivor, with the consent of Mr. and Mrs. Bouverie, and the *executor and administrator*, with the consent of Mr. Bouverie, might execute the two powers at one and the same time. Which would prevail?

The *intention* must have been to release the power; but even if such was *not* the intention of the parties, the deed of 1811 operated as a release of the powers.

It may be argued that the power was appendant as to the estate of the trustees, and of Mr. Bouverie, and in gross as to the other estates. But the consequence would not follow, that the release of 1811 still left the *old* powers in *esse*, so far as they rode over the estates in respect of which they were collateral. This, where such is the intention, is the rule in regard to some powers. For example, a power to a tenant for life to charge

100*l.* on the estate may well subsist in regard to the estates in remainder, although he has departed with his life-estate. But here the power in its creation was intended to pass the *whole fee*. When the donees of it by their own *act ['528] prevented themselves from exercising it to that extent, it became void in *toto*. For nothing less than the fee could be sold, because the price of the whole fee was to be obtained for the estate, which was to be laid out in the purchase of another estate, to be settled to the same uses. Of course the estate could not be sold under the power reserving to Mr. Bouverie his life-estate. For the money would be necessarily laid out in the purchase of other estates to which Mr. Bouverie would also be entitled for life; and the trustees could not at once settle the new estate on the persons in remainder. It equally follows, that if the donees of the power have departed with the estate in possession for a particular interest which they cannot afterwards defeat, they cannot execute the power at all. For it no longer rides over the entire interest in the subject, which entire interest, and which only, was to be sold under the power.

Our case is distinguishable from

1. A lease granted by a tenant for life, under a power in the settlement, because the power of sale in its creation was made subject to the exercise of the power of leasing.

2. An interest vested in another person, which is defeated by the execution of the power of sale, because *there* the power does convey all which the parties intended it should.

Here the parties cannot exercise the power in opposition to their own conveyance; and they cannot exercise the power for the remaining interest, because that is contrary to the intention of the settlement creating the power.

Of course an exercise of the two powers cannot make a good title.

No. 4.(d)

Argument in favour of the Destruction of a Power to a Tenant for life to appoint to his Children.

IN a recent case (1808, in which year the first edition of this

(d) Vide *supra*, vol. 1, p. 103.

work was published,) A., tenant for life (without any limitation to trustees to preserve,) remainder to his children, as he should appoint, remainder to himself in tail, remainder to himself in fee, levied a fine before making any appointment, and the title was objected to by a gentleman, for whose opinion I cannot [*529] but have great respect, on the ground *that the power was merely a power of selection, and therefore could not be released or extinguished by fine.(I)

It must be admitted, that the power in this case was merely a power of selection, or as it is generally termed, a power of specification ; but it does not appear to follow from that admission that the power could not be released or extinguished. The only ground upon which it can be contended that the power could not be extinguished or released is, that it was a power *simply* collateral when the donee has no interest whatever in the estate, and such a power certainly cannot be released or extinguished either by fine, feoffment, or common recovery.

A power appendant, at least as to the life estate, it certainly was not ; but it seems to have been a power in gross, which although it did not arise out of the estate of the tenant for life, must be considered as exercisable by him for his own benefit, and

(I) Mr. Preston says, " the objects of a power are the persons who are to take under the exercise of the power, where the power is to appoint among particular persons, or some of them, as in the instance of powers in favour of A. B. and C. D., or in favour of a class of persons, as children, or any or either of them. The power of making the appointment is a mere authority, but the right of taking under the appointment is an interest or benefit. These consequences follow : the person to whom the power is given may exercise the power, but he cannot release it, nor, *according to the more prevailing opinion* (an opinion combated by Mr. Sugden, who is supported by some gentleman of great learning), will it be extinguished by fine, &c. But the person in whose favour the power is to be exercised may release the right of taking under the power. But" he adds, " some powers are an interest in the person to whom they are given—as powers to jointure—and such powers may be released or defeasanced." (a) In another passage the same writer observes, " that mere authorities, as distinguished from interests, are releasable only by the person for whose benefit they are to be exercised and not by the person to whom the authorities are delegated. This is the course which has been generally observed, which has been sanctioned by the authority of several gentlemen, some living and some dead, of highly distinguished eminence. " Mr. Sugden," it is added, " has treated some powers, formerly considered as mere authorities, as powers of selection in favour of children, to be releasable by the the donees of the power." (b)

(a) Prest. on Abstr. vol. 2, 261, 262.

(b) Prest. on Abstr. vol. 3, p. 399.

not as a mere collateral power. A power to a tenant for life to jointure after his death is a power in gross, (Edwards v. Slater, Hard. 410.) Now what is a power to jointure but a power of selection or specification? *The tenant for life [*530] selects the woman whom he chooses to marry, and then appoints that after his death, *when his estate has ceased*, she shall take the estate for life. Here, as in the case before us, the estate appointed cannot take effect out of the interest of the donee of the power, and yet a power of jointuring, like every other power in gross, may be extinguished by fine (King v. Melling, 1 Ventr. 225.) Indeed it would be difficult to discover any real distinction between a power of jointuring and a power of appointing to children. In neither case is the donee compellable to exercise his power; and, in each case, the power is annexed in privity to his estate for life, and he has an interest arising from the exercise of his power by the benefits it enables him to bestow. In Edwards v. Slater (Hard. 410,) a power to a tenant for life to create a lease for thirty-one years, to commence after his death, was held by Hale, Chief Baron, and Baron Turner, to be power in gross, and to be barrable by a fine or feoffment. Lord Chief Baron Hale said, that where the power does not fall within the compass of the estate, as where the tenant for life has a power to make an estate which is not to begin till after his own estate is determined, such power is not appendant or annexed to the land, but it is a power in gross, because the estate for life has no concern in it; and yet such a power (he added) may, by apt words, be destroyed by release, or by fine or feoffment, which carry away and include all things relating to the land. This case seems to govern the point before us. Sir Matthew Hale's definition of a power in gross clearly embraces a power to a tenant for life to appoint the estate amongst his children after his death, and the cases are not easily distinguishable.

The doctrine that powers of this nature cannot be released or extinguished is by no means new. It has been frequently urged, but without success; and, in the very case of Edwards v. Slater, Baron Rainsford held the power to create the term to be a power simply collateral; but this Lord Chief Baron Hale, and Baron Turner clearly over-ruled, which makes the case as strong an authority as can possibly be wished for.

The opinion under discussion owes its origin, perhaps, to powers in gross being frequently termed powers collateral; and the word "collateral" being considered as meaning *simply* collateral. Thus in *Saville v. Blacket* (1 P. Wms. 777), a power to tenant for life to charge money on the estate was called by the Lord Chancellor a collateral power; and it is observed in a modern publication of much merit (1 Saunders on Uses, 164),
 [*531] "That the power in that case is erroneously called *collateral*, whereas, according to Lord Hale's definition, it was certainly in gross." The observation, that the power in question was a power in gross, is correct; but it was not *erroneously* called *collateral*, for a power in gross, and a power collateral,) is one and the same thing.

There is, however, still an authority behind, which may perhaps be adduced against these observations. The case to which I allude is *Thomlinson v. Dighton*, reported in many books, which was a devise to A. for life, and then to be at her disposal, provided that she disposed of the same to any of her children after her death. She executed the power by lease and release, and a fine; and a question arose as to the due execution of the power. According to the report in Salkeld (1 Salk. 239), two questions were made, the second of which was, whether this power could be construed as a power appendant to the estate for life, so as by the destroying of that it might be destroyed or extinguished, or a collateral one. Powell, Justice, said this was not a power appendant or appurtenant, nor was it in the nature of an emolument to the estate like a lease for life, with a power to make leases for twenty-one years, for that effects the estate for life, and is concurrent with it, and has its being and continuance, at least for some part, out of it; but this power arises after the estate, and has its effect upon another interest, so that the estate for life is perfect without it, and in no wise altered or affected by the execution of it.

Upon an attentive consideration of this case, it will appear that the question was, whether the power was appendant, or in gross; the word "collateral" being, as we have seen, sometimes used as synonymous to the words "in gross." That this meaning was given to the word in the case before us is proved by Mr. Justice Powell's argument, which is to the same effect as Hale's defini-

tion of a power in gross in the case of *Edwards v. Slater*. Mr. Justice Powell's opinion certainly was, that the power was a power in gross; and it seems so to have been considered by Mr. Peere Williams, who, in his admirable argument in that case (1 P. Wms. p. 149,) in answer to an objection that the power was destroyed, admitted that if the fine had been levied before the lease and release, it would have operated as an extinguishment of the power. For he contended, that as the fine came *after* the release *it came too late to do any hurt*; and although he afterwards said, that the power seemed collateral, yet he did not rely upon that position, and cited no other authority for it than the *old case of a power to executors to sell, which is [*532] clearly a power simply collateral. Parker, Chief Justice, in delivering the resolution of the court, said, that as to the first objection, that the power was extinguished by the fine, it might be answered, that if the power was well executed it was executed by the deed which was antecedent to the fine, and therefore it was impossible for the power to be extinguished by the fine (10 Mod. 72.) This appears to be a clear admission by the court, that the power might have been destroyed by fine; for otherwise the answer would have been, not that the fine came too late, but that the power could not have been extinguished by fine.

The late Mr. Powell, however, in his treatise (Powell on Pow. p. 9. 33) of Powers, has considered the power in this case as a power simply collateral. He states broadly, that the Court were unanimously of opinion, that the wife had, under the will, an estate for life *only, with a power of specification simply collateral*.

If the learned reader should think that in *Thomlinson v. Dighton* the power was deemed a power in gross, that case alone must have considerable influence on the question under consideration, and, indeed, the very system of powers must be overturned, to hold the power simply collateral. Should it be determined that a power of this nature cannot be barred by a fine, the intention of many settlements must inevitable be defeated. If an estate be limited to the children of the marriage, as the parent shall appoint by will, or to the children *living at the parents decease*, as he shall appoint by deed or will, with a remainder, in either of these cases, to the children in fee, in both these cases no effectual settlement can be made upon, or by a child, until the parent's

death. I have put the case of a remainder in *fee* to the children in default of appointment, because it has been contended, that although the power is simply collateral, yet where the children are tenants in tail, a recovery suffered by *them* will over-reach and destroy the power of appointment. The case has been considered similar to that of Page and Hayward (Page v. Hayward, Pig. App. Comm. Rec. 176; 2 Salk. 570.) To this opinion the Author himself once inclined, but further consideration has induced him to consider the point very doubtful. For in Page v. Hayward, although the words expressed a condition, yet they were construed to be a limitation: and therefore it is the common case of a vested estate-tail, with a limitation over in a certain event, in which case it is quite clear that a recovery suffered before the happening of the event will defeat the limitation over. It is like the case put by Hale, *Chief Justice, in *Benson v. Hudson* (1 Mod. 188; 2 Lev. 26; and see *White v. West*, Cro. Eliz. 792,) of a tenant in tail, with a limitation so long as such a tree shall stand; and he held that a common recovery would bar that limitation. But in our case the question would be, whether, during the life of the donee of the power, the estates to be created under the power would not be considered a *charge* upon the estate-tail. Every purpose of such a power might, under a contrary construction, be sometimes defeated. Suppose a father, tenant for life, with an exclusive power of appointment to his children, to sell his life-estate, we have seen that he might still execute his power: but if the purchaser were to join with the children in suffering a recovery, the parent would, according to this doctrine, be deprived of the right for which he stipulated, by the settlement, of selecting the child to inherit his estate. What would be the consequence of this doctrine if A. were tenant for life, remainder to B. for life, remainder to his children as he should appoint, remainder to his first and other sons in tail; and upon a child coming of age, A., without the concurrence of B., were to join with the child in suffering a recovery? Would not B., the father's, power be destroyed? There is a wide difference between the *donee* of the power having ability by a recovery to destroy the power, and the remainder-man in tail having the same right. Again, it has been contended, that although the power cannot be extinguished,

yet it may be released to the remainder-man in exclusion of the objects of the power, as the donee is equally a trustee for them all. This opinion, however, assumes that the donee *is a trustee* of the power, a doctrine which it would be difficult to support; and even should it be proved, yet ulterior questions would arise. It might be questioned, whether, as he was a trustee, he could bind his discretion during his life; and whether he would not be guilty of a breach of trust in preferring the remainder-man to the immediate objects of the power. But it really seems so clear upon principle as well as authority, that the power is a power in gross. that it is not thought necessary to pursue our inquiries on points arising out of the doctrine that the power is *simply collateral*. The objection is now (1815) daily losing ground.(1)

*No. 5.

[*534]

Hele v. Bond.(e)

14th and 16th March, 1684.—By Lease and Release, and by fine, Sampson Hele made a voluntary settlement. In the release was contained the following proviso: “That if the said Sampson Hele shall at any time or times hereafter during his life be minded to alter and make void the uses limited to the sons of Sampson Hele, the younger, and their issue male, and to his own issue male, and shall at any time, or from time to time during his life, by any instrument or writing, by him to be sealed, and with his own hand subscribed, in the presence of two or more credible witnesses, who shall write their names as witnesses thereto, signify and declare the same, and thereby, or by any other writing or writings to be by him sealed and subscribed, and witnessed as aforesaid, shall limit, declare, or appoint the use of the premises to any other persons in any other manner than is before limited, and for any estate or estates in fee-simple, fee-tail, for life, or any

(e) Vide supra, vol. 1. p. 119. 449.

(1) In Mr. Preston's book on Abstracts, vol. 1, p. 398, published in 1818, the subject is discussed; and it is added, that the more prevailing opinion now is, that the estate-tail is charged with the power, and with the estates to arise under the execution of the power, and that the power, while in *feri*, cannot be barred by the recovery of the owner of the estate-tail.

number of years in possession, &c. And any such new limitation or appointment by any other writing, in like manner to be sealed and subscribed and witnessed from time to time, shall and may revoke and alter, and also make any other limitation of the premises by any other writing in like manner to be sealed and subscribed to any other persons, or in any other manner, or for any other estates in possession, &c., and so from time to time, and so often as the said Sampson Hele, the elder, shall think fit." Then the fine should enure to the new uses.

5th Oct. 1687.—Sampson Hele, senior, by deed-poll, setting forth *in hæc verba*, his said powers to revoke and limit new uses, and such new uses to revoke again, and limit other, and referring to such powers, did, according to the said powers, revoke the estates authorized to be revoked, and *pursuant to the same powers* limited new uses. There was no power of revocation in this deed.

11th Oct. 1704.—Sampson Hele, senior, setting forth in like manner his powers in the first settlement, revoked the [*535] uses of the *settlement, and also those of the deed-poll, and by virtue of his power *in the settlement*, and of all other powers, limited new uses.

3d Feb. 1712.—The cause to try the validity of the last revocation came to be heard before Lord Chancellor Harcourt, when several authorities being cited, his Lordship took time to consider thereof; and a few days afterwards he declared it was a new case, and that he did not find any authority to warrant such a revocation, nor was there any instance in any of the authorities insisted on of such power of revocation; but he referred it to the Judges of B. R. for their opinion:

Whether the uses limited by the deed-poll of 5th October, 1687, were well revoked by the deed of 11th October, 1704, by virtue of the power of revocation contained in the deed of 16th March, 1684, or by the recital of that power in the deed-poll of 1687?

10th July, 1713.—Lord C. J. Parker, Powys, and Eyre. Justices, certified that they, with the late Mr. J. Powell, heard counsel upon the question, and were all four of opinion that the power of revocation and limitation of new uses in the deed of March, 1684, was fully executed by the deed-poll of 1687; and that the further power in the deed of March, 1684, to revoke any

new limitation or appointment, was void in the creation as to such uses as should afterwards be newly limited, unless a power of revocation should be again expressly reserved, which they thought was not done by the recital of the powers in the deed-poll of 1687, and consequently that the uses limited in the deed-poll were not revoked by the deed of 1704, and that all four were ready to have given their opinion accordingly; but some of the counsel for the defendant desiring to be further heard, they three (since the death of Justice Powell) had heard counsel again, but saw no reason to alter their opinion.

18th July, 1713.—Lord Harcourt concurred in the opinion of the Judges, and decreed accordingly.

1717.—From this decree there was an appeal. The reasons for the appellant were signed by Northey, Raymond, and Jodrell; and they insisted, 1. That the original power reserved to revoke all new uses was valid, for the intent of the party ought to be the guide in these cases; and this intent was as fully expressed by the proviso precedent to the uses in the deed of 1687, as it could ever be by any proviso subsequent, which had there been, it was admitted the uses created by the deed of 1704 would have been good. And 2. That the *original powers [*536] were only partially executed by the deed-poll of 1687; and the further power to revoke such new uses was still subsisting, and such an original existing power had never been determined, before this to be void. On the other hand, the only legal reason insisted upon by Powys and Cowper, who signed the reasons for the Respondent, was, that if such ambulatory and endless powers of revocation (powers within powers, and without precedent in the law) were allowed, purchasers, and marriage settlements, with ease might be defeated, and titles be rendered precarious and uncertain.

This case was ably argued in the House of Lords by Sir Thomas Powys and Sir Peter King for the Respondents, and by Sir Edward Northey for the Appellant.

Both sides insisted upon the Resolution in Digges's case, 1 Co. 173, as authorities in their favour.

For the Respondent, it was argued, that the power could be exercised but once. And they likened powers of this nature to conditions at common law; and that at common law such a con-

tinuing condition as this could not have been created. They enlarged upon the endless contests which a contrary doctrine would introduce, and the dangers and frauds to which it would subject purchasers, whilst on the other hand it was easy to add a power of revocation where such was the intention. And they moreover insisted, that as a power of revocation may be reserved *toties quoties*, this power was only tantamount to the usual power of revocation; and being once fully executed without a new power reserved, was *functus officii*.

On behalf of the Appellant, it was argued that as the other party admitted that a power of revocation *toties quoties* might be newly reserved, it was impossible to contend that this power, which in its first creation enabled such revocation *toties quoties*, was invalid. In the cases which had occurred the power was single, and it was therefore absolutely necessary to reserve a new power; but in this case the first power prevented the necessity of any future power.

It was more consonant to the rule of law to limit all the uses in the first deed declaring the use of the fine, (9 Co. 9,) and this was no greater stretch than a power to appoint by will; in which case the *last* will, although there were twenty, would prevail, or a power to appoint by the *last* deed the donee should execute in his lifetime. It was in effect a declaration that the last uses he should declare only should stand.

In answer to the other objections, it was said, that [*537] the power was *only for the life of the owner, and so uses could not be limited *in infinitum*; nor was it dangerous to purchasers, as the future power would be fraudulent against them, and every purchaser would take a conveyance of the interest, as well as a limitation under the power, which would extinguish the future power.

But even admitting the weight of this objection, it was forcibly argued, that the recital of the powers in the deed of 1687 was tantamount to a declaration of his intention that such powers should continue, and therefore amounted to a reservation.

The decree however was affirmed in the House of Lords. The journals of the House of Lords state, that after hearing the Judges of the Court of King's Bench, as to the matter of law, *who continued of the same opinion* as was certified by them to

the Court of Chancery, and also hearing *all* the other Judges, who concurred in opinion with the Judges of the Court of King's Bench, the appeal was dismissed, and the decree affirmed.(f)

No. 6.

Of the Execution of Powers by Infants under the old Law.(g)

1. Dyer, in his reading on the statute of wills, says, that if a man makes his will, and wills that J. S., who is within age, shall have the disposition of his land, that is good. The same law is where a woman covert hath such authority.

2. And in *Grange v. Tiving*.(h) Bridgeman, C. J., laid it down that in the case of a bare power or authority, where an infant or feme covert is used but as an instrument or conduit pipe by another who hath no such disability, though upon the act an alteration or transferring of an estate do follow, yet the law looks upon him from whom that power or authority is derived, not upon the weakness of the person acting by it, and therefore an infant may, as an attorney, give livery upon a feoffment; so may a feme covert though it be to her own husband, so if *cestui que* use, before the statute, desired his executors should sell his land, a feme covert, or infant executor, so he be of age to be executor, may sell his land, and if he devise that his wife shall sell his land, though she after take a husband, and so hath altered her condition, she may sell the land, and she may sell it to her husband; for in these cases the wife or infant [*538] were but instruments, the estate moved from him, and it shall be said the act of the deviser, or him who gave this authority. This was upon the statute of wills. He then distinguished powers raised by the statute of uses, but held that a bare collateral power was like to an authority at common law. If A. make a conveyance to uses, with power to B. to revoke, who had nothing to do with the land as owner, nor hath any thing in it by the limitation of the uses, this power is collateral to the estate

(f) Journ. Dom. Proc. 9 May, 1717.

(g) Vide *supra*, p. 211.

(h) Bridg. 107.

in the land, and B., whether infant or feme covert, might revoke, as he conceived; and he thought the law was the same if it were a collateral power to B., or his heirs, who had nothing to do with the land, to revoke by writing under his or their hands. The heir, though he had been a disseisor, and made a feoffment, or had released, or though he were an infant, might revoke, because it was a bare power to be executed by the heir, not resulting from an interest in him or his ancestor, or tending to prejudice him in interest.

3. And it has been thought that an infant may execute even powers appendant and in gross.^(I) The case of *Hollingshead v. Hollingshead*⁽ⁱ⁾ is, as reported, an authority that way. An infant, tenant for life, with a power of jointuring, upon his marriage covenanted to settle lands on his wife, and afterwards died without having made any jointure, and equity made good the jointure, which, as the facts are stated, could only be on the principle that the infant had a disposing power. But Lord Alvanley, when Master of the Rolls, seemed to think that the infant had done some act after he came of age to confirm the jointure.^(k) And in a case at the Rolls in the year 1738, the Master of the Rolls said, that the case of *Hollingshead v. Hollingshead* was an idle case and not law.^(l)^(II) In the great case of [*539] **Hearle v. Greenbank*,^(m) both the counsel and the court said repeatedly, that there was no case in which it had been decided that an infant could execute a power appendant or in gross. Lord Hardwicke said, that the applying for several private acts of parliament to enable infants to execute powers given to them, showed the sense of mankind in that re-

⁽ⁱ⁾ 2 P. Wms. 229; 1 Stra. 604, Gilb. Eq. Rep. 168; 4 Bro. C. C. 466, cited; see *Lady Hooke v. Grove*, 5 Vin. Abr. 293, pl. 40.

^(k) See 4 Bro. C. C. 466.

^(l) *Colton v. Hoskins*, Rolls. 21 March, 1738; 16 Vin. Abr. 486, pl. 3; and see *Lord Kilmurry v. Dr. Grey*, 2 P. Wms. 671, cited: explained in 3 Atk. 713.

^(m) 3 Atk. 695; 1 Ves. 298.

^(I) An infant may also execute a power coupled with an interest, if his infancy be dispensed with; or if, from the nature of the power, it be evident that it was in the contemplation of the author of the power that it should be exercised during minority. 1 Prest. Abs. 326.

^(II) I have not been able to find any case on this point in Reg. Lib. The point probably arose incidentally in a case in *Colton and Newland*, which appears from the registrar's book to have been before the Master of the Rolls in Hilary Term, 1738.

spect ; and he held, decidedly, that a power to a feme covert, an infant, to appoint an estate, notwithstanding her coverture, did not authorize her to appoint the estate during her infancy, as it was a power to be exercised over her own inheritance. Lord Hardwicke, in this case, showed not only that the power could not be legally executed during the donee's infancy, but that the testator did not intend that it should be, as he gave it expressly during coverture, but not during infancy, and *expressio unius est exclusio alterius*. From this it has been inferred, that Lord Hardwicke was of opinion that such a power might, by express words, be given during infancy ; but it is manifest that he merely intended to show, that, even if such was the doctrine, it would not apply to the case before him. It would be a bold decision, that an infant may have a power of disposition over an estate through the medium of the statute of uses. Before the statute, it is clear that an infant could not alien a use limited to him, that is, could not direct his trustees to convey the estate to a third person. In that respect equity followed the law. Now the statute only operates upon what were uses at the time it passed. A power *not* simply collateral is a beneficial right to direct the trustee to convey the estate to whom you shall appoint. This direction an infant cannot give by reason of his non-age. Therefore, the appointee never gains a use, or equitable right, upon which the statute can operate. The law is already carried to its utmost limit in the power given to femes covert, and the disability of an infant is much stronger than that of a married woman ; and a married woman, before the statute, might have directed the use, if empowered to do so. In a very recent case, (n) Sir John Leach held at the Rolls, that an infant female had no disposing power over personal estate given to her separate use, although a settlement of it was made by the direction of the court. He said, that by the rule of law she had no power of disposition during her minority, and the court had, he thought, no jurisdiction to give her such power ; and he was not aware that any [*540] case was to be found in which the court had attempted to exercise such a jurisdiction.

4. It is not till recently that the case of *Grange v. Tiving*,

(n) *Simson v. Jones*, 2 Russ. & Myl. 365.

before Lord C. J. Bridgman was known to the profession.(o) A settlement was made by a covenant to stand seised to the use of the settlor for life, remainder to his wife in fee, with a power for him, or any of the heirs of his body, to revoke the uses and limit new ones. The settlor died, leaving an only daughter, and she, whilst an infant and married, exercised the power of revoking the use to the wife, and limiting the fee to herself. The C. J. held, that the two powers to revoke and limit new uses were distinct powers, and that she might revoke, notwithstanding her coverture and infancy, but could not, during her infancy, exercise the power of limiting new uses. He said, that if a man make a feoffment to the immediate use of J. S. for his life, who is then nineteen or twenty years old, and so of age of discretion, or to the use of Alice Stile, who is then a feme covert, with power to make leases for three lives, &c., he would not determine whether a lease according to that power, executed by that infant, be good or not; for without all doubt it might have been so limited, by express words of the power, "that he or she might make such leases whether he or she were within age or of full age," and then it had clearly been good: for if he who was owner of the estate had no disability upon him, he might make use of any hand, how weak soever, to reach out that estate. But the question will be, in that case, whether he who made that conveyance, by naming the person whom he then knew to be an infant, and giving an immediate estate and an independent power to make leases without restriction in point of time, did not intend, that notwithstanding that incapacity, the infant should make such leases, and so might implicitly intend what he might have expressed, that they should be good leases, whether made under that disability or not. If I make a conveyance to the use of myself for life, remainder to my first son to be begotten, with a power of making leases to myself, and after to my son when he comes to be in possession if I die, my son at the age of twenty years, yet he held, that he could not execute this power of leasing till he came to twenty-one. He then compared powers of revocation to conditions, and quoted the cases upon conditions upon which he relied. He thought such a condition upon a feoffment, "that if he, or the heir of his body, signed, sealed, and delivered" such a writing, then the feoffment

should be void, might be *performed by the heirs of his [*541] body, notwithstanding infancy or coverture, for though the signing, sealing and delivering were acts individual and inseparable from the person, yet they were but external, corporeal and mechanic acts. There was nothing required but the thing done, nothing, in the performance of the condition, that of itself required any other concurrence of judgment but such as was requisite to the natural efficiency of the act, as in the case if the conditions were if he in person tendered a ring, though the act were personal, yet nothing more of skill or understanding was required to it than what was necessary to the effecting that act, that is, the tender of the ring. But if an act of judgment was required, an infant could not, he thought, revoke. He then relied upon the general intent of the settlor; for if an infant cannot revoke, the words and intent are not performed, "that any heir of his body may revoke." Probably no heir of the body may revoke; for the heir of the body may, for several successions, be a daughter, and those daughters be married before twenty-one; then, notwithstanding this power, a stranger shall hold the land, and so she that was an infant shall prejudice herself irrevocably by an act by her during her infancy. The like may be the mischief if the heir of the body were a son: if he cannot revoke during his minority, perhaps he can never revoke, for he may die during his minority, and leave a son or daughter behind. But he was of opinion that she could not exercise the power of appointing the estate to her own prejudice.

5. Bridgeman's distinction, that a power of revocation and new appointment may be executed by an infant to the extent of the revocation, though not further, would probably not be followed at this day. His reasoning is not satisfactory, either with reference to the capacity of the infant, the donee, or the intention of the donor. His opinion was, that an infant may execute a power appendant, but he does not discuss the real question, viz. whether such a power is not in the nature of property, and therefore incapable of being exercised by an infant.

No. 7.(p)

A Bill for amending the Laws respecting the attestation of Instruments, made in exercise of certain Powers in Deeds, Wills, and other Instruments.

WHEREAS in the creation of powers, authorities and trusts, the same, or the power of consenting to or directing acts [*542] respecting the *same, are mostly required to be exercised by deeds or instruments executed by the donees thereof, and attested by one or more witness or witnesses, and the mode of attestation required varies in many cases: And whereas the substance of the requisition in such cases is the attesting by the witnesses of the execution of the instrument; the frame of the attestation signed by the witnesses is merely formal: And whereas the form of the attestation frequently, from ignorance or inadvertance, has not contained the full statement of the acts which the witnesses were required to attest, whereby the titles of many purchasers, and of other persons claiming under such instruments, have been defeated: And whereas it is expedient to prevent in future such deeds and instruments from being invalidated for want of a formal attestation; Be it therefore enacted, that every deed or other instrument hereafter to be executed, with the intent to exercise any power or authority or trust, or to signify the consent or direction of any person whose consent or direction may be necessary to be so signified, shall, if duly executed according to the power, and attested by the number of witnesses required by the power, although the attestation signed by the witness or witnesses shall not state the compliance with the terms of the power, be of the same validity and effect, and no other, at law and in equity, and provable in like manner as if a full and proper memorandum of attestation had been subscribed by the witness or witnesses thereto: And the attestation of the witness or witnesses thereto in general terms, or merely expressing the fact of one ceremony having been performed, without stating the other or others, or whatever the form of the attestation may be, shall not exclude the proof or the presumption of the ceremonies to which

the witnesses were required to subscribe an attestation, having been actually performed.

No. 8.

Scroggs v. Scroggs.

Reg. Lib. B. 1754, fol. 496.(q)

THE trust in the agreement before marriage was, "to permit such son or sons of their bodies, and the heirs male of such sons, to receive the rents during all such time as the trustees should have in the premises, as the plaintiff's father, together with the trustees, or "the major part of them, or together [*543] with the survivor of them, should appoint." By the settlement, the eldest son, was in every event to have 100*l.* a year, and *children* were substituted for *sons*. The settlement was executed when the plaintiff, the eldest son, was two and one-half year old, and he had lost his sight. The plaintiff stated that his father wanted him to sell his reversion, which he would not do, and that then the father made a bargain with the second son, to whom he appointed: That the father represented to the trustee that the eldest son had threatened to sell his reversion, and was very undutiful, &c. The plaintiff insisted that the variation in the settlement, as there was then no other son, and he had lost his sight, was to warrant an appointment to a daughter, in case there was no other son.

The father and mother denied any knowledge of the variation; and stated the disorderly life of the son, and his marriage to a woman of no fortune. The father stated that he applied to his son to join in the sale of the estate for his own benefit.

The father's answer, in which he represented the Duke of Somerset, the surviving trustee, as a perfectly consenting party to the appointment, was flatly contradicted by the Duke himself, who stated, that he believed that the father had misrepresented the son to him, and that if he had been apprized of all the circumstances, he would not have executed the appointment.

There appeared to be a dispute between the father and eldest

son, about another estate belonging to the son, of which the father had received the rents during the son's minority.

It was decreed, "that the deed of appointment be set aside, and that it be delivered up to the plaintiff to be cancelled; and that neither the defendant Edward Scroggs, the second son, nor any of his issue, do insist on, or make use of the deed of appointment, or the contents or operation of it, in any court of law or of equity. And his Lordship doth declare, that the settlement executed after the marriage, hath unwarrantably departed from the marriage articles, by limiting the estate to the use of such *child* or *children* as should be appointed, instead of limiting the same to such *son* or *sons*, &c. and the same ought to be rectified. And his Lordship ordered a new settlement to be executed accordingly," and the father was decreed to pay the costs.

[*544]

*No. 9.

Sloane v. Cadogan.(r)

IN this case, where it was contended that a general bequest by Mr. Cadogan included property over which he had only a power, and consequently defeated a gift in the settlement to Lord Cadogan in default of appointment, it was admitted in the argument that in general a sweeping disposition, however unlimited in terms, would not include property over which the testator had merely a power, unless an intention to execute the power could be inferred from the will. But it was said that great Judges had disapproved of that rule. Lord Alvanley, in *Langham v. Nenny*, 3 Ves. jun. 467, wished that the rule had been otherwise; and that it had been held that a general disposition would operate as an execution of the power; and in *Nannock v. Horton*, 7 Ves. jun. 391, Lord Eldon said, that he was not sure that the rule as now established did not defeat the intention nine times out of ten. In favour of the rule it had been said that to overturn it would be to destroy the distinction between power and property. That was denied. The marked and only material distinction between power and property is, that in case of absolute property, although the party make no disposition of it, yet it will descend to his

(r) Vide *supra*, vol. 1, p. 367.

representatives; whereas a person must actually execute his power, or the fund will go to the person to whom it is given in default of appointment. But why should not the same words operate as an execution of the power which would pass the absolute interest? Where is the distinction as to the purposes of disposition between a general power like this and the absolute interest? If the solemnities required by the power are adhered to, it would startle a man of common sense, not versed in legal subtleties, to understand so refined a distinction. As therefore, the rule stood upon no principle, and had been regretted by great Judges, the Court would be anxious to distinguish cases, and not to consider every case within this general rule. Now there was not a single case in the books which governed the present. It was a peculiarly strong case. The gift to the Earl in default of appointment was without consideration, and the parties had a power of revocation. The persons who prepared the settlement did not understand the distinction between power and property. They gave the money to such persons as Mr. C. should appoint, and in default of appointment, to him and his [*545] assigns. There the power was merely nugatory; it was not larger than the gift, nor different from it in effect; besides, the property moved from Mr. Cadogan; the settlement as to the Earl was merely voluntary; and the power was part of Mr. Cadogan's old dominion, and consequently the execution of it must receive a favourable interpretation. In this respect it was said that all the cases were distinguishable: *Moulton v. Hutchinson*, 1 Atk. 558; *Andrews v. Emmott*, 2 Bro. C. C. 297; *Buckland v. Barton*, 2 H. Blackst. 136; *Croft v. Slee*, 4 Ves. jun. 60; *Nannock v. Horton*, 7 Ves. jun. 391; and *Bradley v. Westcott*, 13 Ves. jun. 445, were all cases where the power was given by one person to another, and could not be compared to the present, where the power was reserved by the party over his own property. There were two cases, it was admitted, where nearly the same circumstances did occur, *Ex-parte Caswell*, 1 Atk. 599, *Bennet v. Aburrow*, 8 Ves. jun. 609. But the first case came on merely upon a petition, and Lord Hardwicke said, he would not say what his opinion would be, if it came on upon bill and answer. Besides, Lord Hardwicke overruled this case by a later determination. In the last case the property in default of appointment was given to

the next of kin, which might be thought to distinguish it from the present. But if there was no authority against the plaintiff, there were two very considerable cases in her favour. The first was *Maddison v. Andrew*, 1 Ves. 57. There a man made a settlement, reserving to himself power to charge, limit, or appoint the estate, with any sum not exceeding 1,000*l*. By his will, without making the slightest reference to his power, he gave some legacies, and then charged all his estate with the payment of his debts and legacies. Lord Hardwicke held, that the power was part of the old ownership, and that it was but a shadow of difference that he had charged *his* estate, whereas that was before settled to uses, for these powers to the owner were to be considered as part of the property. Now this was precisely the present case; and to decree against the plaintiff, the Court, it was strongly insisted, must overrule Lord Hardwicke's decision. The other case was *Standen v. Standen*. It was impossible to read that case without seeing that Lord Rosslyn would have decided it on the ground of the power being equivalent to the ownership, even if the circumstance had not occurred to which the decision was generally referred, that the testatrix had no real estate except [546] what was subject to the power; and yet in that case the power was a gift by a will from a husband to his wife, and was not a part of the donee's old dominion.

On the other hand, it was argued, that to hold the will to be an execution of the power would be to over-rule all the cases on residuary bequests. The case of *Maddison v. Andrew* decided nothing more than that where a man had a general power of appointment the fund should be subject to his debts, which had been long the law of that court; but the Master of the Rolls observed, that there, as in the case before him, the estate was settled subject to the power: at any rate then, it was said, that case was not now an authority.

The Master of the Rolls held that the will did not amount to an execution of the power. The circumstance of the attestation had been held not to be material, and it was now settled that a general disposition would not include property over which the party had only a power, unless an intention appear.

No. 10.

*Tempest v. Sabine.(s)**Pollexfen v. Adelmere.*

CHANCERY, 29th June 1743.

24th November 1702. By a marriage settlement, a term of 600 years was created to raise and pay to younger children such sums as the father should think fit, and as he by deed or will should appoint, and subject to and chargeable with the same upon trust to attend the inheritance. The father, who was tenant for life, and the eldest son of the man who was tenant in tail, suffered a recovery to the use of the father in fee, but the recovery did not destroy the term. The father and son made a mortgage in fee, and the father covenanted not to make any appointment of portions to overreach the mortgage. By his will he devised the estates to trustees, to sell and pay the incumbrances and his debts; and out of the remainder of the money to pay his second son 1,000*l.*, and to his two daughters 3,000*l.* a-piece. The second son and two daughters insisted that the will operated as an appointment of portions under the term, and that they were entitled prior to the mortgages. By the decree made by the Lord Chancellor, after stating that a question arising whether the portions and maintenance given by the said will [*547] out of the residue of the money arising by sale of the real estate, ought to be considered as an execution of the power vested in the said testator by his marriage settlement, touching portions and maintenances for his younger children, and as a charge on the term of 600 years thereby limited, his Lordship declared that the same could not, under the circumstances of the case, be considered as an execution of the said power, or a charge on the said term of 600 years; and therefore,

Did order and decree the said Wm. Freeman, the surviving trustee of the said term, to assign the same to attend the inheritance, or for the benefit of any purchaser or purchasers of the said estate, as the said Master shall direct.

(s) Vide *supra*, vol. 1, p. 370.

No. 11.

Wallop v. Earl of Portsmouth, ROLLS, 25th April, 1752.(1)

BY INDENTURES of Lease and Release, of the 25th and 26th days of May, 1742, the Release being of four parts, and made between William Sloper, Charles Smith, and Alexander Chalmers, of the first part; John Wallop and Catherine his wife (afterwards Lord and Lady Lymington,) of the second part; Thomas Vivian, Esq. of the third part; and Joseph Ashton Gent. of the fourth part, all the several estates of Lady Lymington were conveyed to several uses, and from and after the deaths of Lord and Lady Lymington and the survivor of them, To the use of such child or children, sons or daughters, or solely to one of them, as after to be begotten, on the said Lady Lymington, by her said husband, or by any other husband or husbands that she should after marry, in such shares, &c. and for such estates, &c. and subject to such conditions, and to the payment of any sum or sums not exceeding 2000*l.* to any person except such child or children of the said Lady Lymington, and at such time and for such uses as Lady Lymington, notwithstanding her coverture, should by any writing, executed by her in the presence of three witnesses, appoint, with or without power of revocation, and with or without power of limitation of new and other uses; in default of appointment to the first and other sons in tail, with remainders over.

The estates were vested in trustees by an Act of Parliament to sell, and pay debts, and lay out the money in the purchase of other estates, to be settled with the estates unsold to the old uses.

[548] Lord Lymington died the 18th November, 1749.

Lady Lymington died 15th April, 1750, without making any appointment, in pursuance of the before-mentioned power in the Indentures of Lease and Release of the 25th and 26th days of March, 1742, unless by will hereinafter mentioned.

Lady Lymington by her will, willed and desired that all her

(1) Vide *supra*, vol. 1, p. 377.

debts, legacies, and funeral expenses, be first paid and satisfied out of her real and personal estate, which she did thereby charge with the same; and gave and bequeathed to her sons, Barton Wallop, and Bennet Wallop, the sum of 2000*l.* a-piece, and gave and bequeathed to her son Henry Wallop the sum of 1,000*l.* Then she gave other specific and pecuniary legacies. And to her daughter Catherine the sum of 7,000*l.* besides the 3,000*l.* she was entitled to by her marriage settlement, which would make her portion 10,000*l.* to be paid her when she should attain the age of 21 years, or be married: but in case she should happen to die before she attained the age of 21 years, or be married, then her will and desire was that the said sum of 7,000*l.* should go and be equally divided amongst her younger children. And lastly, all the rest and residue of her goods, chattels, pictures, furniture, and estates both real and personal whatsoever and wheresoever she died possessed of (after the above legacies and funeral expenses should be first paid and satisfied,) she gave, devised and bequeathed, unto her eldest son John Wallop, Esquire, commonly called Lord Viscount Lynington, his heirs and assigns.

Quere.—Whether the will, under the circumstances aforesaid, is executed according to law, or not; and if the same will operated as a sufficient appointment by virtue of the deed of the 26th of May, 1742, or not?

The answer to this query will depend on several others, and I am of opinion that the power might be executed by will. That the execution of this will in the manner stated is a sufficient execution within the power. That though she does not refer to the power, nor describe the particular lands subject to it, otherwise than by the words *my estate*, yet if she had no other real estate, (as, from its being stated that all her estates were settled, I presume she had not,) I think the will, as penned, must from necessity be understood to mean the estates included in her power.

That the several sums of money given to her children and others were charged by virtue of the will and power, so far as her power extended; and,

That the real estate, subject to those charges, is well [*549] passed by the will, as an appointment to John Wallop, her eldest son.

D. Ryder, 24th April, 1750.

His Honor did declare, that the appointment made by the said late Lady Lymington of 2,000*l.* to her son, the plaintiff, Barton Wallop; of 2,000*l.* to her son the plaintiff, Bennet Wallop; of 1,000*l.* to her son the plaintiff, Henry Wallop; of 7,000*l.* to her daughter, the plaintiff, Catherine Wallop; and of 500*l.* to the defendant, Jeffery Ekins; 100*l.* to Elizabeth Barton, wife of Jeffery Barton; 100*l.* to Matthew Barton; 100*l.* to Montague Barton; 100*l.* to George Reynoldson; 10*l.* to Mary Brett; and 10*l.* to Ann Horsley, is a good appointment. And did order and decree that it be referred to the said Master, to compute interest on all the several sums in the said appointment before mentioned, except the 7,000*l.* to the plaintiff Catherine Wallop, after the rate of 4*l.* per cent. per annum, from the end of one year after the death of the said Lady Lymington. And it was ordered, that the said several sums, and interest, to be computed as aforesaid, be paid by the defendants John Sanderson and Charles Randolph, out of the surplus of the money which should arise by sale of estates vested in them by the said Act of Parliament. And that the rents and profits thereof after the other trusts mentioned in the said Act of Parliament were performed, and the several other sums appointed for the several other persons before named, and interest for the same, were to be paid them respectively. And in case there should be any surplus of the money which should arise by sale of the said estate, after the execution of the trusts contained in the said Act of Parliament, and the payment of the said several sums in the appointment before mentioned, and interest as aforesaid, it was ordered, that the same be laid out in the purchase of lands, with the approbation of the said Master; and such lands were to be conveyed to the defendant, Lord Lymington, and his heirs; and until such purchase should be made, it was ordered that such surplus be laid out in the purchase of South Sea annuities, subscribed in the name and with the privity of the said Accountant-general: and he was to declare the trust thereof, subject to the further order of the Court, And it was ordered that the interest of such South Sea annuities be paid to the same person as would be entitled to the rents and profits of the lands if purchased.

No. 12.

[550]

Dillon v. Dillon.

Reg. Lib. 26th January, 1809.(u)

“ DECREE a settlement to be executed, pursuant to the articles of the 25th of October, 1764, in the pleadings mentioned : and accordingly let the lands of Lissavora, and the lands of Baltydaniel, subject to a life estate to Charles Bunworth and Mary his wife in the lands of Lissavora, and to a life estate for Charles Bunworth in the lands of Baltydaniel, be settled, as to a moiety, to the use of Croker Dillon for life, remainder to his first and every other son in quasi tail ; remainder to the daughters in quasi tail ; remainder to Elizabeth Bunworth in quasi fee. And as to the other moiety, to the use of Elizabeth Bunworth for life ; remainder to her first and other sons in quasi tail ; remainder to her daughters in quasi tail ; remainder to Croker Dillon in quasi tail special, with a power to the said Croker Dillon of appointing both moieties, in such shares, manner and proportions as he should think fit, amongst the children of him and Mary his wife : and declare that the will of the said Croker Dillon was a good execution of the said power, so far as is intended to make an equal distribution of the said settled estates between the children of the said marriage, but to the extent only of limiting to them respectively estates tail therein : and declare that each of the children took one-seventh of the lands of Lissavora and Baltydaniel as tenants in tail : and in the events which have happened, decree the plaintiff entitled to three-sevenths of the said lands of Lissavora and Baltydaniel, *and of the other lands mentioned in the will of Croker Dillon, being the lands of Killemacroshane, Shanebine and Lahern* ; that is to say, one-seventh of his own right, one-seventh devised to his brother John, and one-seventh devised to Caroline Dillon : and let three-sevenths of the said lands be set apart accordingly, and for that purpose let there be a partition.”

Account of the rents and profits of the three-sevenths, viz. of one-seventh from the death of the father, one-seventh from the death of John, one-seventh from that of Caroline.

Defendants to account for sums received by them out of the shares of John and Caroline, and defendants Elizabeth, [*551] Anne and Harriet *to give credit for such sums out of certain bonds mentioned in the pleadings.

Injunction to restrain proceedings on foot of the bonds continued till the taking of the accounts.

No costs.

No. 13.

Earl of Cardigan v. Montague.

Reg. Lib. A. 1754, fol. 406.(x)

THIS case arose upon a question of Election.

It appeared that the late Duke of Montague, under a power contained in his marriage settlement, executed leases to the defendant, Edward Montague, who executed declarations of trust, declaring such leases to be made in trust for the Duke; and the defendants prayed an inquiry as to the *quantum* of the rent, &c. before they were put to their election, and hoped that the Court would thereupon first determine the validity or invalidity of such leases.

Whereupon it was referred to Master Montague, to look into the several leases which were made by the Duke to Edward Montague, of the settled estate, which were then subsisting, and to inquire what powers were vested in the Duke for leasing the estates, and to state his opinion thereon.

The Master by his report stated that he had inquired what powers were vested in the Duke; and that the only power which was vested in him was contained in a settlement of Jan. 1704, in the words following: Provided also, that it shall be lawful for the said Earl Montague, and John (the late Duke), as they

(x) Vide *supra*, vol. 1, p. 446; vol. 2, p. 400. 402, 403, 404. 406. 417. 421. 444, 445. 449.

should be in possession during their lives respectively, by Indenture under his or their respective hand or hands, and seal or seals, attested by two or more credible witnesses, to make any lease or leases of all those iron-works and furnaces in the city of Southampton, and of all other the lands, tenements, woods, hereditaments, rights, privileges, and other things, mentioned in and agreed to be demised by the Earl, by an Indenture bearing date the 29th Dec. 1701, and certain deeds therein recited, for such term and terms, and under such rents, covenants, and agreements, as are therein agreed on, or to any person or persons, from time to time, for any term or number of years absolute, not exceeding thirty-one years, or for any number of years determinable on one, two, or three lives in possession or rever- [552] sion, or by way of future interest, so as there be not in being at one and the same time any lease or leases for years absolute, for above thirty-one years in the whole, and so all such leases, determinable on life or lives, be not to continue longer than for three lives, and so as upon every such lease there be reserved such rents or payments, or more, as by the said Indenture thereinbefore referred to was mentioned and agreed to be reserved; and also, by any indenture in like manner to be made and attested, to make any lease or leases of any of the said messuages in the county of Middlesex, for the encouragement of rebuilding the same, for any term or terms not exceeding sixty-one years from the making thereof, at and under the like respective rents as were paid for the same on the first building thereof, or more; and also by an indenture, in like manner to be made and attested, to make any lease or leases of all or any other part or parcel, parts or parcels of the same premises before mentioned, other than the said capital messuage called Ditton-house, and the orchards, gardens, yards and lands limited to the use of Lady Mary Churchill, and also other than the aforesaid mansion-house called Boughton-house, with the appurtenances thereof, unto any person or persons for the term of twenty-one years, or for any term or number of years not exceeding twenty-one years, or for any term or number of years determinable upon the death of one, two, or three lives in possession, or by way of future interest of such of the said premises as have been usually demised for one, two, or three life or lives, or for years determinable upon the death of one, two,

or three person or persons, & as such estates granted in possession, and by way of future interest absolute, be not made to continue longer than for twenty-one years, and so as such terms for years granted for longer time than twenty-one years be all made to determine upon the deaths of one, two, or three persons at the most, and so as upon all such leases made of such part of the said premises as have been usually let for three lives, or for any term of years determinable upon one, two, or three life or lives in possession or by way of future interest as aforesaid, there be reserved, to continue due and payable yearly, during such leases, *the ancient, usual and accustomed rents, boons, heriots, and services usually paid for the same, or more*, and so as by and upon all such leases to be made for twenty-one years, or any less term of years absolute, not usually let for life or lives, or for years determinable on lives as aforesaid, there be reserved, to continue [*553] due and payable yearly, during *the continuance of such leases, the utmost and best improved yearly rent or rents, which at the time of making thereof can or may be reasonably gotten*, without fine or other income for the same, and so as in every such lease, or leases which shall be made by virtue of any of the powers aforesaid, there be contained a condition of re-entry for non-payment of the said rent or rents thereby to be reserved, and so as such lease or leases be made without impeachment of waste by express words to be therein contained, and so as the lessee or lessees to whom such lease or leases be made do execute counterparts thereof."

(1) And the Master found twenty-four leases respectively numbered from one to twenty-four, both inclusive, to have been all the leases granted by the Duke under the power; and he stated that he had proceeded to look into them. And he found that the first three of such leases, severally numbered 1, 2, and 3, were each of them made for the absolute term of twenty-one years, commencing at Lady-day 1749; and that all the other twenty-one leases were respectively made for the term of ninety-nine years, commencing at Lady-day 1749, if the plaintiffs, Mary Countess of Cardigan, her eldest son, and the Duchess Dowager of Manchester, or any of them, should so long live; and as to the lease, No. 1, whereby the mansion-house called Montague-house, &c. were demised to Edward Montague for twenty-one years absolutely, at the

yearly rent of 300*l.* payable half-yearly, at Michaelmas and Lady-day, unto the testator the late Duke, and the person or persons who for the time being should be seised of the premises in remainder after him, with a proviso therein contained, that if the Duke should at any time during his life, and the continuance of such lease, pay or tender or cause to be paid or tendered to the said Edward Montague, his executors, administrators, or assigns, in the dining-hall of Gray's Inn, 1*s.*, then the lease, and all clauses, &c. therein contained, should absolutely determine: and the like proviso or power being inserted in every one of the said twenty-four leases, and no other objection having been made before the said Master to the said lease, No. 1, but what arose from such proviso, which objection had been made to every one of the said twenty-four leases, the Master conceived that the lease, No. 1, notwithstanding such objection, was a valid lease, and warranted by the said power of leasing.(y)

(2) But as to the said lease, No. 2, whereby not only the honour of Gloucester, but likewise sixteen several manors in Northampton (and more particularly the manor of [554] Boughton, and a great walk, and Boughton Park, with the deer therein, together with other lands in Northampton, and also the manor of Beaulieu in Southampton, were demised to Edward Montague for the like term of twenty-one years, absolute, at the yearly rent of 600*l.* payable half-yearly as aforesaid, the said Master did conceive, from the general, extensive, casual, and uncertain nature and values of the greater part at least of the premises, and the great difficulty, if not utter impossibility arising from thence, of forming any judgment whether the rent thereby reserved was the utmost and best improved yearly rent which at the time of making such lease could or might have been reasonably gotten for all the premises, and the rather as there was no exception contained therein of Boughton-house, &c. which were expressly excepted out of the said power of leasing, for the said reasons he did conceive that the lease, No. 2, was not a valid lease, nor warranted by the power.(z)

(3) And as to the said lease, No. 3, whereby the manor of Ditton and Ditton Park, together with a farm called Hams, and

(y) This was acquiesced in.

(z) This was acquiesced in.

ten acres of land, were demised to Edward Montague for the like term of twenty-one years, at the yearly rent of 290*l.* payable as aforesaid, there being no exception contained in such lease of Ditton-house, &c. limited by the marriage settlement to the use of Lady Mary Churchill for life, which, it was admitted before the said Master, were part of the manor of Ditton, and were expressly excepted out of the power of leasing, he did therefore conceive the said lease, No. 3, not to be a valid lease, nor warranted by the power. (a)

(4) And as to the lease, No. 4, whereby the iron-works in the county of Southampton, and also two corn-mills, and the land thereto, with other lands, were demised to Edward Montague for the term of ninety-nine years determinable on the lives of three several persons therein named, which said iron-works and furnaces, and other premises demised, did appear to be a part only of the premises comprised in the Indenture of December, 1701, referred to in the said power of leasing, and which same part was by the same Indenture agreed to be separately and distinctly demised, although upon looking into such new lease, No. 4, and comparing the same with the said Indenture, and particularly with the articles of agreement therein recited, it did appear that the very same premises were separately and distinctly demised by the said new lease, No. 4, and that such and the [555] same rents and payments were thereby reserved as by the said Indenture, and the other Indentures, and articles therein recited were mentioned, and agreed to be reserved, yet the said Master found that in the said articles there was contained not only a covenant on the part of the lessee to maintain, keep, and leave the said premises in sufficient repair, but that there were also contained therein several other covenants on the part of the lessee, with regard to the time or manner of cutting or felling the several coppices and underwoods thereby agreed to be demised, the not putting any stock or cattle into such coppice, and the like, all in their nature tending to the preservation, good management and improvement of the said premises : and that no such covenants on the part of the lessee were contained in the said new lease, No. 4 ; and as by the said power of leasing it

(a) This was acquiesced in.

seemed to be particularly intended that all leases to be made of the said iron-works and furnaces, and other the premises mentioned in the aforesaid Indenture, or by any of the deeds therein recited, should be made, not only under such rents and payments, but likewise under such covenants and agreements as were therein particularly agreed on, and the aforesaid several covenants on the part of the lessee, being wholly omitted in the said new lease. No. 4, for that reason the said Master conceived such new lease not to be a valid lease, nor warranted by the power.(b)

(5) And as to the lease, No. 5, whereby Palace Farm, and other lands in Bewley, were demised to Edward Montague for the like term of ninety-nine years determinable on the same lives, amongst which premises so demised were contained other part of the premises comprised in the said Indenture of the 29th December 1701, and thereby also agreed to be separately and distinctly demised; and although upon looking into such lease, No. 5, and comparing the same with the said Indenture of the 29th December 1701, the same rents and payments did appear to be reserved by the said lease, No. 5, as by the said Indenture of the 29th December 1701, and the Indentures, &c. therein recited, was mentioned, and agreed to be reserved in respect of such part of the said premises as were comprised in the Indenture of the 29th December 1701, yet it appearing that such lease, No. 5, did also contain some other lands and premises not comprised in the said Indenture of the 29th December 1701, and particularly certain lands therein mentioned, for that reason the said Master did conceive that the said lease, No. 5, was not a valid lease, nor warranted by the power.(c)

(6) And as to the five several leases following, viz. [*556] No. 6, No. 7, No. 8, No. 9, and No. 10, whereby certain messuages, &c. were severally demised unto the said Edward Montague, for the like term of ninety-nine years determinable on the same three lives, it having been objected before the said Master, that the several farms and premises so as aforesaid separately demised by the said five several leases, had not been usually demised for one, two, or three lives, or for years determinable upon the death of one, two or three person or persons, and no old

(b) This was acquiesced in.

(c) This was acquiesced in.

leases, nor any other evidence having been laid before him to show that such several farms and premises had been usually so demised, the said Master did for that reason conceive that none of the said five leases numbered, 6, 7, 8, 9, and 10, did appear to be valid leases, or to be warranted by the power. (d)

(7) But as the five several other new leases following, viz. No. 11, No. 12, No. 13, No. 14, and No. 15, whereby the messuages, &c. therein mentioned were severally demised to Edward Montague for the like term of ninety-nine years determinable upon the same three lives, to maintain and support which said five new leases, five several old leases had been produced before the said Master, by which it did appear that the several messuages, &c. so as aforesaid separately demised by the said five new leases, were in like manner separately demised by the said five old leases, but upon looking into such five old leases, and comparing the same with the five new leases, he found, that in each of the said five old leases, or counterparts, and also in each of the said five new leases, there was contained a covenant on the part of the lessee to bear, pay, and discharge all taxes, rates, duties, and impositions whatever: and that in all the said five old leases there was also contained a covenant on the part of the lessee to maintain, keep, and leave the demised premises in sufficient repair: and that in some of the said five old leases or counterparts there were likewise contained covenants on the parts of the lessees to spend and lay upon the demised premises all the dung, manure, or compost thence arising: and also not to demise, alien, or assign any part of the said demised premises without the license in writing of the lessor, his heirs, or assigns; but that no such covenants as last mentioned were contained in any of the said five new leases: however, it appearing that the same several and respective ancient, usual, and accustomed rents, boons, and services which had been usually paid for and in respect of the several messuages and premises separately [*557] demised by the said five new leases, were severally reserved by such five new leases, and thereby made to continue due and payable yearly during the continuance of such leases, and no other particular objection having been made to

(d) This was acquiesced in.

any of the said five new leases but what arose from the omission of such several covenants as were before mentioned, the said Master did conceive, that notwithstanding such objection, the aforesaid five new leases numbered, 11, 12, 13, 14, and 15, were each of them valid and effectual leases, warranted by the power.(e)

(8) But as to the remaining nine leases, viz. No. 16, 17, 18, 19, 20, 21, 22, 23, and 24, whereby certain farms, &c. were respectively demised to Edward Montague, for the like term of ninety-nine years, determinable on the same three lives; to maintain and support which nine new leases, nine several old leases or counterparts, had been produced before the said Master, by which it did appear that the several messuages and premises, so as aforesaid separately demised by the said nine new leases, were in like manner separately demised in and by the said nine old leases; but upon looking into such nine old leases and comparing the same with nine new leases, the said Master found, that in every one of the said nine old leases, there were contained covenants on the part of the lessees to bear, pay, and discharge all taxes, rates, duties, and impositions whatsoever; and also to maintain, and keep, and leave the demised premises in sufficient repair; and that in several of the said nine old leases there were likewise contained covenants on the part of the lessees to spend or lay upon the said demised premises all the dung, manure, or compost thence arising; and also not to demise, alien, or assign any part of the said demised premises without the licence in writing of the lessor, his heirs or assigns; and more particularly in the old lease, bearing date the 20th day of April 1664, produced before him, to maintain and support the new lease, No. 19, there was contained a covenant on the tenants' part to grind at the mill of the said lessor, situate in Bewley, all the corn and grain which they should spend in and upon the said demised premises; and that in another old lease, bearing date the 20th day of April 1688, produced before the said Master, to maintain and support the new lease, No. 20, there was contained a like covenant on the tenant's part to grind all his corn at the lessor's mill afore-

(e) This was not acquiesced in; and the Master's opinion in this respect was over-ruled by reason of the omission of the covenant to repair.

said; all which covenants on the parts of the said lessees, as they did in their nature tend to the preservation, management, *and improvement of the premises demised, [*558] were for that reason for the benefit, advantage, and security, not only of the immediate lessors, but likewise of all persons claiming after them; but he found that neither the said covenant to bear, pay, and discharge all taxes, &c. nor any of the several other covenants therein before particularly mentioned were contained in any of the said nine new leases, and that the like covenant for grinding corn in the said mill was not contained in either of the said two new leases respectively numbered 19, 20; and as the said several, ancient, usual, and accustomed rents which were usually paid under the said nine old leases, did by means of the said covenant for the tenants' paying and discharging all rates and taxes become clear and net rents, freed from any deduction whatsoever, and for want of such covenants, the several rents reserved by the said nine new leases must, he conceived, be subject and liable to a deduction thereout, upon account not only of the land-tax, but likewise of other rates and taxes which tended manifestly to the prejudice of the persons who since the decease of the Duke had been, or might thereafter be seized of the demised premises: Under those circumstances, the Master craved leave to submit to the judgment of the Court, how far the several rents which appeared to be nominally reserved by the nine new leases, for the want of such covenants for the tenants' paying and discharging all rates and taxes, could or ought to be deemed, in substance and effect, the same several ancient rents as were usually paid by virtue of the said nine old leases, which seemed to be expressly required by the said power of leasing; and consequently, whether the said nine new leases were valid leases, and warranted by the power or not; and more particularly, whether the said two new leases, respectively numbered 19 and 20, were not invalid for want of the like covenants on the tenants' part for grinding their corn at the lessor's mill as were contained in the before-mentioned two old leases, the same appearing to be in its nature a boon or service. (f)

An exception was taken by the defendants to the report; for

(f) The nine leases were held to be invalid.

that the said Master had by his report certified, that he conceived that the five several leases therein mentioned by the numbers 11, 12, 13, 14, and 15, were valid leases, and warranted by the power; whereas the defendants insisted that he ought to have certified that the said five leases were not valid leases.

His Lordship held the said defendants' said exception to be good and sufficient, and therefore ordered that the same should stand and be allowed. According to Lord [*559] Mansfield's note of this case, the Chancellor took some days to consider; and declared he was clear upon the argument, but took time, because there was no case in point. The more he thought of it the more he was convinced. The principle he rested upon was, that the estate must come to the remainder-man in as *beneficial* a manner as ancient owners held it. (g)

Upon the special matter of the said report relating to the several new leases from No. 16 to No. 24, inclusive, his Lordship declared, that all the said leases were not warranted by the power, and therefore void.

No. 14.

Opinions upon the Case of Wykham v. Wykham.

Your opinion is desired on behalf of Philip Thomas Wykham, Esq., next tenant in tail male under the will of Lord Wenman, the testator, his grandfather.

1. Whether the manor and estate devised to trustees to be sold passed by this recovery, the trusts of the will not being performed, and the freehold of such estates being in the heir of the surviving trustee?

2. Whether the recovery is not void as to the manors and estates granted by Lord Wenman to trustees for the purpose of raising Lady Wenman's rent-charge out of the rents and profits of the manors, &c. so granted?

We think that an estate for the life of Lady W. in remainder expectant on the death of Philip Lord Wenman, the devisee, passed, by the deed of 8th June 1766, to the Earl of Abingdon

and John Morton, Esq. in all the devised freehold premises: as to those given by the will to trustees to sell, for an equitable estate, and as to the residue of the devised freehold premises, for a legal estate; and consequently, as the trustees of the deed of June 1766 did not join in conveying to the tenant of the precipe, the recoveries were bad for want of a proper tenant. If we are right in this opinion, (for we think it a very nice point,) then the present Mr. Wykham's remedy is by bill in equity against the heir of the surviving devisee in trust, and the present trustees of the three jointure deeds, and against the heir or devisees of the late Mr. Wykham, praying an account and to be let ['560] into the receipt of the rents of all the devised *estates, subject to keeping down the interest of subsisting mortgages, and subject to the jointures under the three deeds.

The want of the concurrence of the heir of the surviving devisee in the conveyance to the tenant to the precipe, did not affect the recoveries; because, the devise being in fee, the recoveries might have been good, if there had been a proper conveyance of the equitable estate to the tenant.

R. RICHARDS.

LAUNCELOT SHADWELL.

Lincoln's Inn, 19 August 1800.

I am of opinion that the jointuring power was well executed, and that the recovery was void.

As to the estates in Oxfordshire devised to the trustees by Lord Wenman, the fee certainly passed to them; as to the other estates, the devisees beneficially interested took the legal estate, and the power of jointuring was, as to the last-mentioned estates, a common-law power, and as to the others, a mere power operating by way of declaration of trust on the legal estate in fee in the trustees.

The power embraces all the estates, and clearly, I apprehend, authorized a limitation of the estate of freehold to trustees during the life of the wife, for whom the jointure was raised. If it were necessary to effectuate the intention, I should think the power, although indefinite and without words of limitation, sufficient to authorize a limitation of the fee; but in this case the effect of a limitation in fee would be at law to defeat the remainders over

after the estate of the person exercising the power, which could not be the intention ; and besides, such a construction must be put upon the power as would enable *all* the tenants for life to exercise the power in a manner equally beneficial, as no advantage was intended to be given to one over another beyond priority, and if the first tenant for life could limit the legal estate in fee, then the other tenants for life could at most raise equitable jointures. For these reasons I think it clear that the power only authorized a limitation of the estate to trustees *during the life of the wife*.

Taking this to be the construction of the power, the next question is, whether it was duly executed. The deed of 1766, which, for want of a lease for a year or livery of seisin, could only operate as an execution of the power, first, by virtue of the power limits the estate to the Earl of Abingdon and Mr. Morton generally, to hold to them and their heirs upon trust to pay to Lady Wenman, during her *life only*, the jointure agreed [*561] upon, and Lord Wenman covenanted, that the trustees (in case the marriage should take effect and Lady W. should survive him) should, during the life only of her Ladyship, peaceably enjoy, &c. Now it appears to me clear, that upon the whole of this deed, taken together, the trustees took an estate of freehold in remainder expectant upon the decease of Lord W., during the life of Lady W., and no longer. It must be admitted, that the power might have been exercised wholly by way of covenant ; see 1 Ventr. 228, Ray. 239, 3 Keb. 511. And it would be rather a refined argument, that because the power is attempted to be formally exercised, the covenant shall have no operation. In truth, the covenants are of equal efficacy in the exercise of the power as the formal words of appointment, and they may all therefore well be considered as constituting together the declaration of the appointor's intention. It would be a mistake to compare this to the case of a *conveyance* of a fee, with covenants for quiet enjoyment during the life of the vendee only. But if it should be thought that the trustees took a fee, and that such a limitation was not authorized by the power, yet it seems quite open to contend that even in that case the power was well exercised. It may be insisted that the power authorized a limitation of all or any part of the estates to trustees during the life of *the intended jointress*, and for no other estate : that therefore *the*

estate which the trustees are to take is contained in the will itself, and the tenant for life has only to designate the land and the amount of the jointure: and that consequently the limitation of the fee is merely void and the trustees take, by force of the will itself, an estate during the life of the wife only, and that the construction must have been the same if the tenant for life had limited no estate. A devise of an authority is within the statute of wills, and when the power is exercised, the appointee takes under the will itself. The nearest case to this which I am aware of is, *Peters v. Morehead*, Fort. 339, better reported in *Fitz. 156*, by the name of *Peters v. Masham*.

For these reasons I am of opinion that the power was well exercised and that the trustees took, during the life of Lord W., only an equitable estate in the lands first mentioned in Lord W.'s will, and a legal estate in the other lands. It appears to me also, that the further jointures were well raised, at least in equity, but I shall not stop to consider them minutely, as the validity of the recovery must depend on the deed of 1766. But I must here observe, that I take it to be quite clear, that though [*562] every one of the executions should be deemed *void, yet equity would relieve against the defective execution of the power, and would compel the remainder-man to make a good legal jointure of 1,000*l.* a year to Lady W.

The recovery suffered by the first tenant in tail after the late Lord W.'s death, was suffered without the concurrence of either the heir of the surviving trustee in Lord W.'s will, or of the trustees in the jointure deed, or of Lady W. And it appears to me that the recovery was bad for want of a good tenant to the precipe. As to the first estates, of which the legal fee was in the trustees of the will, I think, that whatever construction the power may receive, it can hardly be deemed badly executed as to them, so as not to give the equitable estate to Lady W., and in that case the recovery would, as to them, be void, although the power should, as to the other estates, be considered to be defectively executed. In regard to the estates of which the tenant in tail was seised at law, as the legal tenants for life did not join in making the tenant to the precipe, the recovery of course cannot be supported. Indeed the question will turn wholly on the

validity of the appointment, for if that was good, the recovery must of course be bad.

E. B. SUGDEN, 1808.

The plaintiff in this cause must contend that the power authorized the limitation of an estate of freehold during the life of the wife, and no longer, and that no greater estate passed by the deeds exercising the power. The defendant will, I suppose, endeavour to establish one of three points; viz. 1. That the power merely authorized the limitation of a chattel interest during the life of the wife; or 2. That it authorized the limitation of a fee, and that a fee was limited by the deeds of appointment; or 3. That if it authorized the limitation of a life estate, a fee was limited under the power, which consequently was an excessive execution, and therefore void at law. Any one of these constructions would, I apprehend, defeat the plaintiff's claim. If the first were to prevail, clearly the execution would be void, and even a valid execution of the power would not have affected the validity of the recovery. If the second be the true construction, then all the subsequent estates would be turned into equitable estates, and the recovery would, I conceive, be good as an equitable recovery. The third construction would equally defeat the plaintiff, unless the Court should consider the excess only in the execution as void.

As the point will now certainly be decided, it is no consequence what my opinion upon this case is. I shall therefore rather address myself to the arguments which may be [563] urged in favour of the plaintiff's claim.

The power is for tenants for life to grant, convey, limit or appoint all or any part of the estates to trustees, upon trust, by the rents and profits thereof, to raise and pay the sum mentioned as a jointure for any wife he or they shall marry, for and during the term of each such wife's life. It is not defined what estate shall be limited to the trustees, but taking the words altogether, they clearly point to an estate during the life of the wife. The jointure is for her life, and the estate, out of which it is to arise, must be commensurate with it. To restrain the trustees to a chattel interest during the wife's life, would be to introduce words not in the will, for the purpose not of effectuating but of defeating the

testator's intention, for the words, "by the rents and profits," being general, would, if it were necessary, clearly authorize a sale, and a term for years would fetch less money than a life estate. The devise of this authority is a devise within the statute of wills; when the power is executed, the estate created comes in lieu of the power, and the limitation must be read as if originally contained in the will. If the words of this power were to be turned into a devise, it seems clear that the estate of freehold would pass to the trustees, during the wife's life. This construction is supported by the case of *Mansell v. Mansell*, reported in *Wilmot*, 36. There an estate was given to the testator's son, Ed. Mansell, during his life, "and that he shall be capable, with the consent of trustees, to settle a jointure on the woman they agree to in writing he shall marry: and from and after *his decease*," to his sons in strict settlement. Under the power an estate for life was limited. The case is not nearly as strong as ours; but although the execution of the power was objected to on a great many grounds, yet no objection was made on this head; and Lord C. J. Wilmot treated it as clear, that the power authorized the limitation of the freehold to the wife for life. He said, (p. 53) in answer to an observation that the execution of the power divested nothing, that it postponed the remainder; it turned a remainder expectant upon one life into a remainder expectant upon two. It not only removes the chance of the enjoyment a life back, but it suspends the power of acquiring the absolute dominion of the estate by a recovery. In another case (*Churchman v. Harvey*, *Ambl.* 335,) where the power authorized a limitation for life, the same Judge thought that the reason might be to prevent the next [564] in remainder suffering a common recovery during her life; and this may be urged as an auxiliary argument in every case where the power is general, and the testator, as in our case, had a strict settlement in view.

It seems clear, therefore, that the power authorized the limitation of an estate of freehold. But the intention of the testator requires that no greater estate should be limited than during the wife's life. It is a clear general rule of construction, that where in a power words of inheritance, or words tantamount, are wanting, a clear intention must appear to authorize the limitation of a fee. A power to *sell* of itself authorizes the disposition of the

fee from the nature of the act to be done ; but where the act, as in our case, does not require that construction, life estates only can be limited ; see *Casterton v. Sutherland*, 9 Ves. jun. 445 ; *Rex v. The Marquis of Stafford*, 7 East, 521. In our case, so far from the purpose requiring a fee, there is great ground to contend that, if instead of being to the trustees generally, the power had authorized a limitation to the trustees *and their heirs* expressly, yet it would have been confined to the wife's life. The power must, in this respect, receive the same construction as a devise : and it is clear that a devise to trustees and their heirs generally, in trust for a person for life, will only pass the estate during the life of the *cestui que* trust, where there is a devise over of the estate after his death : *Shapland v. Smith*, 1 Bro. C. C. 75 ; *Sylvester v. Wilson*, 2 T. Rep. 444 ; and see 5 East, 171 ; and see *Curtis v. Price*, 12 Ves. jun. 89 : and that line of cases, where, by construction, even in deeds, a general limitation may, it seems, be confined in favour of the intention. The testator in our case never could have intended to authorize the limitation of a fee. He must be supposed to know that the estate created must take effect as if limited by his will. Consider how the limitations would stand if a fee were limited under the power : To Philip for life, remainder to trustees in fee, for securing the wife's jointure, remainder to Thomas Francis for life, &c. The testator clearly meant all his devisees to take the legal estate ; and each tenant for life, successively, to have the same power of jointuring. This will be effected by construing the power as enabling the limitation of a life-estate only, but if words are to be added, in order to enable the gift of a fee, the first tenant for life would be enabled to defeat all the subsequent limitations at law, and convert them into mere equitable estates, which of itself seems a sufficient objection against this construction ; see Hale's [*565] argument in *Jenkins v. Kemishe*, Hard. 398.

For these reasons it would seem that the power only authorised the limitation of an estate for life. Having ascertained the true construction of the power, it remains only to inquire whether it was duly executed. The first appointment for making such jointure as Philip was empowered to make by the will, appointed the estate unto Lord Abingdon and Mr. Morton, to hold to them and their heirs, upon trust to raise the jointure ; and he covenant-

ed that the trustees, in case his intended wife should survive him, should after his decease and during the life only of his wife, enjoy the estate. It is a general rule of construction upon all deeds, that the intent must be gathered from every part of the deed, and that no part be rejected, unless in the case of repugnancy. It should never be lost sight of that this is not a conveyance. Provided that the solemnities required to the execution of the power be duly attended to, there is scarcely a mode in which the power may not be executed. A power may be executed by a covenant to levy a fine, or suffer a recovery, and a fine or recovery levied or suffered accordingly; *Earl of Leicester's case*, 1 Ventr. 278; *Herring v. Brown*, 2 Show. 185. So in this case Philip, Lord Wenman, might have covenanted that, when he went to St. Paul's, or did any other indifferent act, the appointment should take effect; and of course the power might have been executed simply by a covenant. So Lord Hardwicke held that a covenant might operate as a release of an *interesse termini*; *Saltern v. Melhuish*, Ambl. 250. From all this, it seems clear, that the words of appointment in our case, and the words of covenant, may operate together, and must all be attended to, in order to get at the operation of the appointment. Suppose the appointment had been made to the trustees and their heirs, for the estate hereinafter mentioned, would it not be clear that the covenant would confine the estate to the wife's life, to take effect after the husband's death? And is not our case precisely the same in effect? In general, certainly an appointment by deed must, as to the words limiting the estate, receive the same construction as a conveyance at common law; but this rigid construction has been relaxed where the words merely regulate or modify the estate, as the words *equally to be divided*, *Rigden v. Vallier*, 3 Atk. 731, 2 Ves. 252; *Goodtitle v. Stokes*, 1 Wils. 341, Say, 67. The same doctrine may be applied to our case.

Should the fee, however, be held to pass under the [*566] deed, I fear it could not be contended that the excess only would be deemed void at law, but I think the case might be supported on the decision in *Peters v. Morehead*, referred to in my first opinion. If the power should be deemed badly executed under the first deed, I do not see any chance of supporting it under either of the others. Should the power be held

to be well executed, and the trustees to have taken, during the life of the wife only, the recovery as to the estates of which Lord W. was legal tenant for life will of course be invalid. This question, however, will not be discussed at law. It appears to me, upon further consideration, that even if the plaintiff prove successful at law, yet there will be considerable difficulty in his way as to the estate devised to the trustees in fee.

The case should contain an accurate copy of the devise of the two estates, and of the power and deeds of appointment. In regard to the lands, which I apprehend passed under the will to the trustees in fee, the Judges, I take it, will certify that the trustees in the deeds of appointment took no estate in them, as the power was in regard to them merely equitable; and then the question, as to the recovery of these lands, will be decided when the cause goes back on the equity reserved.

E. B. SUGDEN, 1808.

No. 15.

Phelp v. Hay.(h)

Rolls, 18th May 1778.

14th March 1747.—By the agreement made previously to the marriage between the Rev. Abraham Phelp and Ayliffe Tufton, after reciting the treaty for the marriage, it was agreed that Ayliffe Tufton should have power, as well before as after such marriage, either to make an absolute sale of her lands and chattels, and with the money by such sale to purchase other lands and chattels any where in England, and convey unto the trustees therein named, their heirs, executors, &c. or unto such other persons as the said Ayliffe Tufton and his mother should nominate, as well all such lands and hereditaments wherein the said Ayliffe Tufton then had an estate of freehold or inheritance in fee simple or fee tail, or for terms of years, or otherwise howsoever; as also such lands and chattels which might *be [*567]

(h) Vide supra, vol. 1, p. 482. 494: vol. 2, p. 53.

purchased as aforesaid, to and for the use and benefit of the said Abraham Phelp and Ayliffe Tufton, and the issue of their two bodies, in such manner and form, and by and after such rates, shares, and proportions, either jointly with the said Abraham Phelp, or alone, separate and apart from him, as the said Ayliffe Tufton should think proper and fit to do.

9th and 10th February 1749.—By Indentures of Lease and Release, and by a fine, Mr. and Mrs. Phelp (the marriage having been solemnized) conveyed her sixth part of certain real estates unto Sir George Hay, his heirs and assigns for ever, in trust, nevertheless, to the use of the said Abraham Phelp, and Ayliffe his wife, and their assigns, during their lives, and the life of the longer liver, remainder to the use of such person and persons, and for such estate and estates as the said Ayliffe Phelp should in manner thereby required, appoint; and in default of such appointment, in trust, to and for the use of the right heirs of the said Ayliffe Phelp for ever. Note.—The fine was declared to be to the use of the said George Hay, and his heirs, in trust, nevertheless, to, for, and upon the uses and trusts before expressed.

13th February, 1755.—By an Indenture between Ayliffe Phelp, then the widow of the said Abraham Phelp, of the one part, and the said Sir George Hay, of the other part, after reciting the articles of 14th March, 1747, and the Indentures of the 9th and 10th of February, 1749, and the fine levied accordingly; and also reciting, that by the Indenture of Release, a greater power was given to the said Ayliffe Phelp of disposing and limiting her said lands and estates than was given or intended to be given to her by the said articles made previous to her marriage, it being the intention of such articles, and of the parties thereto, that the said Ayliffe Phelp should limit, settle, and assure her said lands and estates unto and upon the issue of the bodies of them the said Abraham Phelp and Ayliffe, in case they should have any such; and the said Ayliffe Phelp having then three children by the said Abraham Phelp, to wit, Charles Tufton Phelp, her eldest son, Jane Phelp, her daughter, and James Phelp, her youngest son, It is witnessed, that for the settling and assuring the said sixth part of the said premises upon the children and issue of the said Ayliffe Phelp by the said Abraham Phelp, according to the said articles of agreement, the said Ayliffe Phelp, by virtue of the

power unto her given, as well by the marriage articles as by the Indenture of Release, did grant, limit, direct and appoint that the said Sir George Hay, and his heirs, should from thenceforth stand seised of *the said undivided sixth part of [568] the said premises, and that the said fine, and the uses thereof, should enure to the use of the said Ayliffe Phelp and her assigns for life, remainder to the use of the said Charles Tufton Phelp, James Phelp, and Jane Phelp, or to any or either of them, their, his or her heirs and assigns, in such manner and form, and by and after such rates, shares and proportions, and charged and chargeable with such sum and sums of money, unto and amongst any or either of them the said Charles Tufton Phelp, James Phelp, and Jane Phelp, and at such time and times as she the said Ayliffe Phelp should by any deed, or by her will, to be duly executed in the presence of and attested by three or more credible witnesses, give, grant, devise, limit, direct or appoint; and for want of, and in default of such appointment, to the use of the said Charles Tufton Phelp, James Phelp, and Jane Phelp, and his and their several and respective heirs and assigns, as tenants in common, and not as joint-tenants.

Charles Tufton Phelp died under age, and without issue.

18th May, 1772.—The said Ayliffe Phelp, by her will, duly executed, declared her will and meaning to be, and she did thereby, by virtue of the proviso aforesaid, direct and appoint, that the said Sir George Hay should stand seised of the said sixth part of the said estates, in trust, by mortgage, to raise and pay thereout to testatrix's daughter, Jane Phelp, her executors, administrators and assigns, within six months after testatrix's decease, the sum of 2,000*l.*, and subject thereto, to the use of the said testatrix's son, James Phelp and his assigns, for life; remainder to the said Sir George Hay and his heirs, during the life of the said James Phelp, in trust, to preserve contingent remainders, with remainder, after the decease of the said James Phelp, to his issue in general tail: and in default of such issue to the use of testatrix's daughter Jane Phelp, for life; remainder to the said Sir George Hay, and his heirs, during her life, in trust to preserve contingent remainders; with remainder after the decease of the said Jane Phelp, to her issue in general tail, and in default of such issue, to the use of testatrix's mother, Frances Tufton, and her assigns, for

her life, with remainder to the testatrix's own right heirs, with power for the said George Hay, and his heirs, with the consent of the person for the time being entitled to the estate, to sell the same, and to purchase other lands to be settled to the same uses.

18th May, 1778.—By a decree in a cause wherein the said James Phelp was plaintiff, and the said Sir George Hay, and Charles Blicke, and Jane his wife (late Jane Phelp,) [*569] were defendants, the Master of the Rolls declared, that he was of opinion, that under the will of Ayliffe Phelp, the said Charles Blicke, and Jane his wife, in her right, were entitled to the sum of 2,000*l.* to be raised by way of mortgage of the estate in question, with interest from six months after testatrix's death; and that, subject to such mortgage, the said James Phelp was under the said will entitled to an estate in tail general in the said estate, with remainder to the said Jane Blicke in tail general; and that all the subsequent or other limitations in the said will concerning the said estate were void; and that no valid appointment of such the reversion in fee of the said estate as aforesaid having been made by the said Ayliffe Phelp, subsequent to the Indenture of 13th February, 1755, according to the power therein reserved to her, the appointment made by such indenture of 13th February, 1775, did, as to such reversion in fee of the said Leicestershire estate as aforesaid, become absolute; and that under the appointment made by the said Ayliffe Phelp by the said Indenture of the 13th of February, 1755, such reversion in fee of the said estate belonged to her three children, Charles Tufton Phelp, James Phelp, and Jane Blicke, their heirs and assigns, as tenants in common, in equal third parts; and that the said Charles Tufton Phelp being dead, intestate, and without issue, his undivided third part descended to the said James Phelp, as his brother and heir at law; and that by the means and in manner aforesaid, the said James Phelp was then entitled to him and his heirs to two-third parts of the reversion of the said estate so subject, and in manner aforesaid; and the said Jane Blicke to her and her heirs to the remaining third part of such reversion as aforesaid of the said estate.

Various proceedings were had in the cause. The Master found that the legal estate was in the heir of Sir George Hay, and he

joined with James Phelps, who suffered a recovery of the estate, in a mortgage for securing the 2,000*l.* and interest.

It appears by the Registrar's book(*i*) that the plaintiff submitted to the Court, that it was the true intent of the articles of 14th March 1747, and the Indenture of 13th February, 1755, that Ayliffe should have power to limit and appoint an estate of inheritance either in fee simple or tail to her issue, but that it was never meant that she should have power to limit any smaller estate for her issue than an estate-tail; and that the plaintiff was advised that there was no limitation contrary to the intention, but that he had an estate-tail *given to him subject to [*570] the payment of 2,000*l.* The defendant of course submitted the contrary.

No. 16.

Roberts v. Dixwell.

Reg. Lib. B. 1738, fol. 119.(*k*)

THE limitation was to the use of such of the children of the marriage, for such estates, and in such shares and proportions, as the husband and wife or survivor should appoint.

The husband having survived his wife, by his will appointed the estate unto the plaintiff, his only son, his heirs and assigns, forever, upon condition that he and they should pay his only sister of the whole blood, Elizabeth-Mary Roberts, 3,000*l.* and 50*l.* a-year for maintenance, until she attained twenty-one, or married, and the testator charged the estates therewith; and in case the plaintiff refused to pay the same, then he appointed the estate itself to the daughter, her heirs and assigns, for ever; 2,000*l.* to be paid to Elizabeth-Mary at twenty-one, or marriage; but if she died before, the said 2,000*l.* to be paid to his daughter, Mary Roberts, by another marriage, at twenty-one, or marriage; and he declared the 3,000*l.* to be in satisfaction of the 1,000*l.* as stated in 2 Eq. Ca. Abr.

(i) Lib. Reg. B. 1777, fol. 537.

(k) Vide *supra*, vol 1 p. 486.

It was decreed, that "the plaintiff was entitled by virtue of the appointment, subject to the charge of 2,000*l.* part of the sum of 3,000*l.* therein charged for Elizabeth-Mary, and of 50*l.* a-year for her maintenance; and his Lordship doth decree, that the trustees do accordingly convey the same to him, so subject as aforesaid; and the defendant, Elizabeth-Mary, is to be at liberty to apply to the Court for raising and paying the sum of 2,000*l.* when the same shall become due; but his Lordship declared that the limitation over of the said sum of 2,000*l.* to the said Mary Roberts by the will, is void, and as to the sum of 1,000*l.* residue of the said sum of 3,000*l.* mentioned in the will, his Lordship declared that the appointment thereof by the said will, for satisfaction of a debt due from him by covenant contained in his marriage settlement, was void, and that defendant, Elizabeth-Mary, is entitled to have satisfaction for the sum of 1,000*l.* with interest at four per cent. from the death of her father, as a special creditor." And the necessary directions were given by the decree accordingly.

. No. 17.

[*571]

**Newport v. Savage.*

Michaelmas Term, 1736.(1)

• A. HAD a power by will to jointure any wife by limiting, &c. to and for her use, or in trust for her, in lieu of her jointure, or part of her jointure, all or any part of the estate of which he was tenant for life. A., reciting his power, settles, in trust for his wife, for her jointure, the land contained in the power for 99 *years if she should so long live*. It was decreed by the Chancellor, that the power was well executed, and he said, that though in strictness of law this would not have been a good execution of the power, yet a court of equity ought to regard the substance of things. When all parties are mere volunteers, they must be bound by the law; yet where they are purchasers for a valuable consideration, and the execution is defective, the Court will supply it, and it does no injury, for it carries it no farther than the

(1) Vide *supra*, vol. 1, p. 493.

person himself might have done ; and even in cases of purchasers, the Court will, in favour of one, supply non-execution of powers ; and the reason of their not doing it generally is, because it does not appear that the intention of the party was to carry the powers into execution. It was objected, that this was such an estate that this is no bar of dower, but the power is not to give an estate in bar of dower ; but A. was left at large to make a provision for his wife. Besides, in the settlement made on her, it is generally said to be in bar of her dower, and therefore as it will be an equitable execution of the power, so it will be an equitable bar of dower.

Upon searching the Registrar's book, (m) I find that the power was " for Walter, when he should have any estate in possession in the premises for his life, by virtue of the limitation aforesaid, by any deed, to assign, limit, or appoint to or for the use of or in trust for any woman or women that should be his wife, for her life, in lieu of jointure, all or any part of the premises, to take effect from his decease." He limited a term to trustees for 99 years in trust for his wife. The bill was to have the jointure confirmed, and to stay proceedings at law by the remainder-man. The defendant stated a trial at *nisi prius* ; and that a case was reserved for the King's Bench, and he prayed for liberty to proceed in the cause. It was decreed that the plaintiff should be quieted in the estate comprised in the jointure-deed "during so much of the term of ninety-years as she [572] should live, and the defendant was to pay unto the plaintiffs their costs of the suit ; and the injunction formerly granted in this cause, for stay of the defendant's proceedings at law against the plaintiffs, was to be continued.

No. 18.

Lord Muskerry v. Chinnery and Others.(n)

1. THIS settlement comprises merely the estate of Lady M., and not all that, for Guilaharty is not included. The estate of

(m) Lib. Reg. 1736, fol. 33.

(n) Vide *supra*, vol. 1, p. 523; vol. 2, p. 336. 355. 393.

Lord M. does not appear to have been settled. It probably was considerable, for a short time after those leases he was elevated to the peerage. Only a portion of Lady M.'s estate was demised by those leases. Some of the denominations appear to have been suffered to go according to the other uses of the settlement.

The settlement was after marriage, and not in pursuance of any previous agreement, and therefore there is nothing to correct it by.

The object of the parties appears to be by means of Lady M.'s estate to disencumber the family estate of Lord M. All the provisions in this settlement appear to look to that object. The children's portions are charged on this estate. The power to raise 20,000*l.* is thrown upon it. And in addition to these sums, to be raised in the way of direct charge, a power is given to Lord M. (and to Lord M. alone, not to the successive tenants for life, as in ordinary leasing powers) to make leases for any indefinite period, and to take fines, and to raise money in that way without parting with the estate, still retaining all the manorial and seignorial rights, and with these the influence and consequence which large territorial possessions never fail to bring with them. Power is therefore, not directly given to dispose of the estate absolutely, or out and out; but to deal with it in such a way as to make it subservient to the great object of the settlement, and the necessities of Lord M. These observations, which a perusal of the deed has suggested to my mind, ought to be kept in view in deciding on the validity of the acts done under this settlement. This brings me to a consideration of the settlement.

At that time several portions of the lands comprised in it were actually in lease, and that with the knowledge of the parties, and of those who prepared the deed.

[*573] *In private settlements a leasing power is deemed necessary for the benefit of the estate, which might otherwise go uncultivated. That being the object, the power is confined by the necessity which gave it birth, and the leases granted under it are what are called husbandry leases; and such power is always given to all those in succession, the imbecility of whose estate would not enable them to carve such an interest out of the estate of which they were in possession.

In that respect the power on which the questions in this case

turn, differs from the ordinary leasing power given for the benefit of the estate ; for it is not extended to those to whom the benefit of the estate would require that a leasing power should be extended.

It is clear, therefore, that the settlors must, in the creation of this power, have had some other object in view than the benefit of the estate, or the interest of those who were to succeed to it.

We shall be satisfied of this when we consider the form of this power, and compare it with those leasing powers which are introduced into settlements with a view to the benefit of the estate.

They are in their extent limited and definite, confined within the limits which their object requires. They are surrounded by safeguards, and clogged with conditions, to prevent their abuse. They are to be made in possession and not in reversion.

The term is limited ; the rent is to be the best that can be had ; fines and foregifts are strictly prohibited ; waste is guarded against ; and the execution of counterparts is enjoined.

If we look to the power in question, we shall find that all these requisites to an ordinary leasing power are wanting. Power is given to Lord M. from time to time, and *at all times* during his life, to lease or demise *all, every, or any part* or parts, *parcel* or *parcels* of the aforesaid towns, &c. for *any* time or term of years, or lives, and *with* or without covenants for renewal ; and in case of the determination of all or any of the aforesaid leases or lease respectively, from time to time, to make new or *other* leases thereof in *manner aforesaid*, and *with* or without *any fine* or fines, as *he shall think fit*.

Now let us consider what this power expressly authorizes. It authorizes him to make leases ; and first, as to the subject-matter of these leases ; it is “ *all, every or any part* or parts, *parcel* or *parcels* of the lands.” It is clear that the terms of this part of the power authorize leases of every or any part without exception ; without regard to how they were before held or enjoyed ; for if he is restricted in any way as to that, or precluded from making leases of *any* part by **anything* [*574] *whatsoever*, he has not that power which the deed professes to give him.

It seems to me clear therefore that he is enabled to make leases of those parts which, at the time of the settlement were already

in lease. It is not prescribed that these leases shall be in possession and not in reversion, nor is there any limitation or qualification to this power in that respect.

Next as to the term ; it is indefinite, “ for any term of lives or years, with or without covenants for renewal.” Nothing can be more extensive.

The only limit to his power of disposition is, that he shall not alien the fee, so as to part with the reversion, and with it the seignorial rights.

And lastly, he is to make those leases “ with or without fines, as he shall think fit.”

The power of taking fines to any extent necessarily leaves him absolute power as to the amount of the rent. Neither is there any injunction on him not to make the lessees dispuishable of waste.

It is impossible, therefore, not to see that this power differs both in form and substance, both in the end in view, and the means by which that end is to be accomplished, from the ordinary leasing powers.

That this difference was intentional, and not by accident, ignorance, or mistake, will appear conclusively by adverting to the leasing power given in the subsequent part of the deed, and which is in the usual form.

Is it possible, when we compare these two powers, not to be satisfied that the departure from the ordinary form of leasing power was done deliberately and from design ?

The trustee in it (who probably prepared it) was a King’s Counsel at the Bar, whom we all knew to be in considerable practice.

The parties had full power to make this settlement, and the maxim “ *cujus est dare ejus est disponere* ” must not be forgotten.

Such being the case, when this power comes to be considered by a court of law, that court can only look at the instrument “ with legal eyes,” and see what its terms authorize. It is not for that court to say whether it is or is not reasonable, if the terms of it are clear and unambiguous.

If it be alleged that the deed is different from the intent of the parties, it will be for a court of equity to say whether it will reform the deed. *That*, according to Lord Thurlow in *Shel-*

burn and *Inchquin, 1 Bro. Cha., would require, “*irre- [*575]* fragable proof.” Whether, even if there were that proof, your Lordship would hold yourself at liberty to reform this deed at the end of fifty-six years, and against purchasers for valuable consideration, who had on the faith of it been fifty-six years in possession, it will be for your Lordship to say.

I come now to consider these leases, made, as I have said, fifty-six years ago, now at the end of that period, long after the death of the lessors, and after their *personal estate, out of which satisfaction should be made to these lessees, has been disposed of.*

And here I would observe, once for all, that the cases cited arising upon the ordinary leasing power have, in my opinion, no application to this case. They are cases arising on powers, in which the interest of the remainder-man is to be taken into consideration.

But before I enter on the question how far these leases are conformable to the power, I must first meet an objection that has been made, viz. that these leases were not intended to be made in execution of the power. It is true the power is not referred to; but that is not necessary if the lease cannot take effect but under the power, and if the parties must have known that. Now, it is impossible that anybody could have imagined that Lord M.’s life-estate could last for 999 years. It is impossible therefore, to suppose that these leases could have been intended to be served out of that life-estate. This is the conclusion which the law comes to: and which is necessary, *ut res magis valeat.*

The first lease was made the 26th of August, 1779, to William Shirley, in consideration of 1,000*l.* It is for 999 years, at 20*l.* rent. It excepts all royalties, manors, &c., with liberty to enter, &c. and to hunt, fish, fowl, and hawk: powers of distress and re-entry: and a covenant for the purpose of strengthening this lease, that Lord and Lady M. should levy such fine as Shirley’s counsel should advise.

The term in this lease is within the powers; nor can any objection be raised to it, except that the lease to Howell was not determined; and therefore that it was a concurrent lease.

Now Howell’s lease was granted before the settlement, to the knowledge of the settlors; yet they give express authority to lease *all, every, or any* part of the settled estates. This, in my

opinion, clearly authorizes a concurrent lease, or a lease of the reversion, &c. ; and supposing the case of *Coventry v. Coventry* to be only sustainable on the ground that there was a sufficient indication of intent that concurrent leases might be [*576] made, here is the most express declaration that words can convey of that intent ; for without this the words could not possibly be satisfied.

The next lease is made to Roger Shirley, 18th October 1779, for 999 years, in consideration of 2,000*l.* and 150*l.* rent. It contains *liberty to burn the surface* without the penalty in *the acts* ; and it contains a clause of *surrender*. It is contended that to pare and burn the surface is *waste*. There is no authority for that. The acts against burning only call it “bad husbandry ;” as such, they impose a penalty “if done without the consent of the landlord ;” and that penalty is to be given to *him*. The act exempting barren land that has been *improved* from tithes for a certain time, only gives that exemption provided that “*improvement*” was not made by burning the land, unless with the landlord’s consent. There is land which cannot be reclaimed unless by paring and burning the surface ; and, as this is the only lease which gives that permission, it is to be presumed that it contained land to which paring and burning was necessary. It is not to be imagined that one who had so great an interest in the land as a lease for 999 years, would adopt any course of husbandry which would be injurious to his own interest.

I come now to consider the clause of *surrender*. In a lease of so long a term, and for which so large a fine has been paid, such a clause can have little effect. If the lessee were to surrender, he would lose his fine of 2,000*l.* It is objected that he may exhaust the land and then surrender his lease. Upon what ground can such a supposition rest ?

On the effect of such a clause in the case of the ordinary limited leasing power, it would be very desirable to have your Lordship’s opinion.

The King’s Bench and Common Pleas have both decided that a clause in a lease, under the ordinary leasing power, enabling the tenant to surrender, giving the landlord a year’s notice in writing, vitiates the lease. On this point there is a diversity of opinion among the Judges.

The objections to this clause are these :

First, there is a want of mutuality, the tenant having a right to surrender, and the lessor having no right to revoke. The converse of this existed in *Cardigan v. Montague*. To this I think it is satisfactorily answered, that there is no such principle of law as that in every contract there must be that mutuality which is contended for here ; and that in a lease, for every advantage given to the lessee there must be a *correlative* [*577] advantage given to the lessor. In *Cardigan v. Montague* the landlord had a power to revoke. It is said the landlord is fast, whilst the tenant is loose. Now, in cases under the Statute of Frauds, *that* often exists ; and it is no objection either to a bill for a specific execution of a contract, or to an action at law upon a contract, within the Statute of Frauds, that the contract has been only signed by the defendant and not by the plaintiff, and therefore, not binding on the latter. So in cases not under the Statute of Frauds, it is no objection that the landlord is bound and the tenant is loose.

In the case of *Dann v. Spurrier*, 7 Ves. jun., a contract was entered into, by which the defendant agreed to grant the plaintiff a lease “ for seven, fourteen, or twenty-one years,” without saying at whose option. Lord Eldon sent it to law, on a case for the opinion of the Judges, whether the power of determining the contract at the end of the seven or fourteen years was in both landlord and tenant, or in whom. The Judges of C. B. gave their opinion that it was in the tenant alone, and not in the landlord, who was bound for the twenty-one years, though the tenant was not bound beyond the seven years. And Lord Eldon, on this, decreed a specific execution of the contract against the landlord. So in *Price v. Dyer*, 17 Ves. on a similar contract, Sir William Grant held the same thing. So in *Webb v. Dixon*, 9 East, 15, a lease had been granted “ for fourteen or seven years.” At the end of the seven years the landlord, conceiving he had an option of determining the lease, brought his ejectment. It was tried before Mr. Justice Lawrence, who nonsuited the plaintiff, on the ground that the option of determining the lease at the end of the seven years was with the tenant alone, and not with the landlord ; and of this opinion was the whole Court, on a motion to set aside the nonsuit.

Next, it is objected as a practical inconvenience, that if by the fall of prices, or other cause, the tenant has a bad bargain and cannot pay his rent out of the land, he can throw the lease up, and the landlord cannot hold him to it. But it appears to me a strange cause of complaint that a landlord cannot insist on keeping a tenant who is unable to pay his rent. In Ireland the great difficulty is to get rid of a tenant who cannot pay his rent; and our predial disturbances and crimes grow out of attempts to do so. Yet this is the objection which Lord Manners threw out in an *extra-judicial* opinion in a case before him.

I come now to the ground on which the judgment of ['578] the King's Bench, as delivered by Mr. Justice Jebb, rests; and a more extraordinary ground on which a decision can rest, that is *to destroy a great part of the leasehold interests in some of the counties in the south of Ireland*, never came within my knowledge. It is this: The lessee may exhaust the land by repeated cropping, and may then throw it upon the landlord's hands. It is true, that is *possible*; but if that *possibility* avoids a lease for lives, it must avoid every lease where that possibility exists. Now, in what case may not the tenant exhaust the land, and leave it so on the landlord's hands? The land may be exhausted completely in ten years, and the *probability* is much greater that a tenant who has only ten years to come; who has no certainty of a renewal; who will be charged a higher rent on a new lease if he has improved the land, and a lower one if he has exhausted it, will adopt the latter, than that one who has a permanent interest for three lives should do so. Yet the consequence of the decision in the King's Bench would be, that every lease for ten years would be void. It strikes me that the decision is one that cannot be sustained.

Having thus considered the specific objection to these leases, I shall advert to the construction which the plaintiff's counsel puts on the leasing power.

The power is "to lease or devise for *any* time or term of years or lives, and with or without covenants for renewal; and in case of the *determination* of all or *any* of the aforesaid leases, from time to time, to make new or *other* leases thereof, in manner aforesaid, and *with* or without any fine or fines, *as he shall think fit*."

It is contended that, the words "with or without any fine or

fines, as he shall think fit," are to be carried back to the words "with or without covenants for renewal," and for this the case of *Doe v. Martin* has been cited. But the case of *Doe v. Martin* does not decide that the words are to be referred to the first clause, in *exclusion* of and *passing over* the *last* antecedent. They must therefore at least also apply to the last antecedent member of the sentence, by which he is authorized, on the *determination* of any of the aforesaid leases, from time to time, to make new or *other* leases; and such new or other leases may therefore be made *with* or without fines. It is contended that the words "with fines" ought to be confined to leases with covenants for renewal, which are usual in Ireland, and are to be intended covenants for perpetual renewal; and these fines to be the fines usually taken on the fall of lives in such leases. But that construction cannot be made; for to whatever the word "with" is to be applied, the word "without" is also to be ap- [*579] plied, and *vice versa*. And therefore he might, according to that, make leases with covenants for perpetual renewal without any fine, and without any rent. Now, how would this benefit the remainder-man? But again, the "new or other" leases that are to be made, are to be made "with or without fines, as he shall think fit;" and those leases are to be made on the *determination* "of any of the aforesaid leases." It is impossible to imagine that the settlers contemplated the *determination* of a lease for lives renewable for ever in the lifetime of Sir T. Deane; yet *he* and he alone is to make the *new* leases in that event; and such new leases (not made on the fall of lives under a covenant for perpetual renewal, but on the *natural determination* of *determinable* leases) may be made *with fines*. Thus then, the donee of the power would be authorized to take fines on the new leases, though not on the original ones. According to that construction, Sir T. Deane might make leases for two years, and on their determination might make new leases with fines. This cannot be the construction. The words "with or without fines" must, I admit, be referred to each member of the sentence, the first as well as the last; and the leases mentioned in the first member may be made "with or without fines, as he shall think fit." Then what are the leases in the first member of the sentence? They are leases "for any terms or term of years or lives;" and such leases

may be either with or without covenants for renewal, and with or without fines. They may be made without covenants for renewal, and with fines. But it is said that the words of this power are ambiguous, and that the Court will exercise its *astutia* to put such construction on it as will not enable the tenant for life to destroy the estate of the remainder-man. But words cannot be said to be ambiguous on which only one construction can be put that is reconcilable to the rules of grammar or the principles of common sense: and surely that construction would be equally destructive of the interest of the remainder-man which authorizes a lease for lives, renewable for ever, without either rent or fine; and that is the construction sought to be put on the words of this power. Besides, if even *this* power could be so construed as not to affect the interest of the remainder-man, there is another power (that of providing portions) which completely puts it in the power of the tenant for life to destroy the interest of the remainder-man.

That power is general, without any limit. Now, in the [*580] case *of *Long v. Long*, 5 Ves. jun., where there was a similar unlimited power of *charging* portions, the tenant for life directed the *estate* to be *sold out and out*, and the *entire money* to be divided among his *younger children*; and it was held that he might do so, although the estate was limited to his first and other sons, and although it was contended that the remainder limited to the eldest son manifested an intention that he should *get something*. I am therefore clearly of opinion that these leases are good at law.

I shall now proceed to consider how this case may be dealt with in a court of equity. Taking it for granted that the intent of the parties is to govern, we may inquire what was that intent. I have already, in the outset, mentioned my opinion that the object of this extensive power was to enable Sir Tilson Deane to raise money on long leases. To a certain extent that might have been practicable, and beyond that, not so. To *insure* the raising the sum required, a power is given to raise by sale or mortgage, or charging any sum “not *exceeding*” 20,000*l.* Thus, the sum to be *raised off the estate* was *not to exceed* 20,000*l.* This intent is, I think, ascertained by the manner in which Sir T. Deane acted on the powers given him. The acts of the parties are not admissible to affect the *construction* of the deed; but I think they

may be admitted to explain what the parties had in view by entering into the deed. Now, it appears that Sir T. Deane *understood* that, though the powers given him were extensive and one of them unlimited, yet that they were given him in the *confidence* that he would not use them beyond what their object required. Accordingly we find him, after raising about 10,000*l.* by fines on these leases, abstaining from raising under the power of sale or mortgage more (except the amount of one year's interest) than sufficient to complete in all the 20,000*l.* He did, as I have said, exceed it a little, from perhaps being unable to prevail on Chinnery to break the sum he had to lend. But this having taken place after the leases, the surplus cannot be visited on the lessees. The two powers, though different in their natures, may be considered as given for the same purpose, namely, the raising that sum which, and which only, it was agreed should be raised out of the lands. And, after all, what is a long (or perpetual) lease, at a small rent, and a large fine, but a sale of so much of the inheritance? Chinnery has now been settled with; therefore no question can arise as to him; and it was only he that could be affected by the excess above the 20,000*l.*

*I have thus submitted to your Lordship my views of [*581] this case; and I submit them with all respect to your Lordship's better judgment.

I have the honour to be, &c. &c.

F. Joy.

I have already said that it would be most desirable to have your Lordship's opinion on the clause of surrender in leases made under the ordinary leasing power, and on the reasons given by Mr. Justice Jebb in the judgment which he pronounced. In my mind those reasons are far from satisfactory. Very many (perhaps most) leases in the south of Ireland contain such clauses, the landlords there considering them beneficial to the estate and to the remainder-men; as a better rent is obtained, and as none but solvent tenants who mean fairly and conscientiously to pay their rent, if the land, by the exercise of their industry, will enable them to do so, require such a clause. In the case lately before the twelve Judges, (which has gone off by the death of the last life in the lease) that clearly appeared; and the jury found that

a more solvent tenant could be procured, and that the clause was not injurious to the remainder-man, but the contrary, as a better tenant could be got. I understand the tenant as holding this language to his landlord: "I think the rent you demand is high, still I hope by a little expenditure and a great deal of industry, to be able to pay it. But if in this I am disappointed, I will not keep from you your property longer than I can pay you the consideration which I undertook to give you for it." I can see nothing inequitable in that.

No. 19.

The Law as regards Illusory Appointment before the 1 W. 4, c. 46.(o)

1. At law it was clear that any share, however nominal or illusory, would satisfy the terms of the power. The gift of a ring(*p*) or a shilling(*q*) was a good legal execution of the power, although the fund were 100,000*l.*;*(r)* whereas in equity 5*s.*(*s*) or ten guineas,*(t)* or any other sum, merely illusory, with reference to the amount of the fund, and the number of the objects amongst whom it was to be distributed, would have been void. But all the interests given to the child, contingent as well [*582] as vested, were taken into consideration.*(u)* *We shall have occasion to consider how far this distinction between the legal and equitable execution of such a power can be defended upon principle.*(x)*

2. This equity was enforced at a very early period, and was frequently administered ;(*y*) nor has it been less the subject of

(o) Vol. 1, p. 453.

(p) See 1 Vern. 67.

(q) 1 Term Rep. 438 n; and see 1 Ves. jun. 785; 16 Ves. jun. 26.

(r) Morgan v. Surman, 1 Taunt. 289.

(s) Gibson v. Kinven, 1 Vern. 66.

(t) Vanderzee v. Aclom, 4 Ves. jun. 771.

(u) Bax v. Whitbread, 16 Ves. jun. 15.

(x) Vide ch. 11, sect. 2.

(y) See Wall v. Thurborne, 1 Vern. 335. 414; Cragrave v. Perrost, cited, ibid. 355. See 2 Cha. Ca. 228; and see 9 Ves. jun. 395. In Civil v. Rich, 1 Cha. Ca. 310, Lord Nottingham referred to this case, as expressly confined to the widowhood of the wife; Astry v. Astry, Prec. Cha. 256. As to Sweetman v. Woolaston, cited 1 Vern. 356, see 5 Ves. jun. 858.

discussion in modern times.(z) It extended as well to real as to personal estate;(a) and the only difficulty was to ascertain what proportion should in every particular case be deemed illusory. In *Wilson and Piggot*, the proportion given to one of four children amounted only to one sixteenth of the whole fund, and Lord Alvanley held it to be good,(b) although it was one fourth less than an equal proportion. In *Alexander v. Alexander*,(c) the proportion given was only a sixtieth part of the fund to one of five children, and the point was not raised. In *Kemp v. Kemp*(d) Lord Alvanley repeated the desire, which he had often expressed, to get out of the rule altogether, and lamented that equity had not followed the rule of law; but he was compelled, against his inclination, to hold the appointment in that case illusory. The fund amounted to nearly 1,500*l.* There were three objects: to one 50*l.* was given; to another 10*l.* and the residue to the other. The first, therefore, had only a thirty-eighth share, and the second only a one hundred and nineteenth share, of the entire fund, when, upon an equal division, each would have been entitled to a third. Lord Alvanley, in delivering judgment, said that he should hardly have conceived that 50*l.* could be considered a substantial part; but that the sum of 10*l.* was evidently meant to be no gift, the party merely supposed himself to be under the necessity of giving something to each.

3. Thus the doctrine stood till the late case of [*583] *Butcher v. Butcher*,(e) in which the Master of the Rolls, after delivering a luminous and argumentative judgment, held, that as no case had been found in which a sum of the amount in the case before him had been declared illusory, there was no ground upon which he thought himself justified in determining that this was an invalid appointment. He summed up the difficulties attending this branch of equitable jurisdiction in a

(z) See *Menzey v. Walker*, For. 72; but note, there one child was totally excluded; *Maddison v. Andrew*, 1 Ves. 57; *Coleman v. Seymour*, ib. 211.

(a) *Pocklington v. Bayne*, 1 Bro. C. C. 450.

(b) 2 Ves. jun. 351. In *Vanderzee v. Aclom*, 4 Ves. jun. 771, the amount of the fund is not stated; and see *Spencer v. Spencer*, 5 Ves. jun. 362.

(c) 2 Ves. 640; but see 9 Ves. jun. 392, where it is stated from the Register's book that the child did not claim more.

(d) 5 Ves. jun. 849.

(e) 9 Ves. jun. 382. See 1 Bligh, 479.

few words: "To say, under such a power, an illusory share must not be given, or that a substantial share must be given, is rather to raise a question than establish a rule. What is an illusory share, and what is a substantial share? Is it to be judged of upon a mere statement of the same given, without reference to the amount of the fortune which is the subject of the power? If so, what is the sum that must be given to exclude the interference of the Court? What is the limit of amount at which it ceases to be illusory, and begins to be substantial? If it is to be considered with reference to the amount of the fortune, what is the proportion, either of the whole, or of the share, that would belong to each upon an equal division?"

4. In the case of *Butcher and Butcher* there were nine persons, and the fund amounted to about 17,000*l.* To some of the children, 200*l.* 3 per cents. only was given; so that reckoning at that period the stock at even 70 per cent. the share did not exceed a hundred and twenty-second part of the fund. In the next case which came before the Master of the Rolls, the fund was 2,500*l.* South Sea annuities, and there were only two objects of the power; to one 100*l.* stock was given, and the residue to the other. The first therefore had only a twenty-fifth share; and the Master of the Rolls, referring to his former decision, held the appointment not illusory.(*f*) Another case arose shortly afterwards, in which the fund was 2,500*l.* There were five(*I*) objects of the power. To some, the donee of the power gave only a share, which amounted to 33*l.* 6*s.* 8*d.* each, when upon an equal division, they would have been entitled to 500*l.* each. The master of the Rolls said, that he adhered to the rule he laid down in

Butcher v. Butcher; that he would go as far as he was [*584] bound by *authority, and no farther. Show me, he added, a case in which a specific sum, or an equal proportion of what would be the share of each object of the appointment upon an equal division, has been held to be illusory, and I will in the same case make the same decision. And after showing that *Kemp v. Kemp* was an authority only as to the 10*l.*

(*f*) *Bax v. Whitbread*, 10 Ves. jun. 31.

(*I*) Although the power extended to the issue of the children, yet it also seems that they, the issue, were considered as standing in the place of their parent, and there were only five children; *sed. qu.*

and did not turn upon the 50*l.* he determined that the appointment was good, as the sum of 33*l.* 6*s.* 8*d.* was not the same specific sum, or the same proportion of the share of each child, upon an equal division, that had been in any former case held to be illusory. (*g*)

5. In the foregoing case, with reference to the whole fund, the share given was only equal to about a seventy-fifth of it; and in another case, which occurred a month afterwards, the disproportion was still greater. The fund amounted to about 7,100*l.* and there were nine objects of the power, seven of whom had only about 71*l.* a piece given to them. The point was given up in argument; and the Master of the Rolls thought that there was nothing in an objection taken that there might be more children; there was so little probability, under the circumstances, that the shares would ever be reduced below the standard under which he had said he should consider himself bound by the authorities. (*h*)

6. The result of the authorities, then, was rather a negative than an affirmative rule. Lord Alvanley determined, that where a party is, in default of appointment, to take a third share, a gift of a hundred and ninetieth share to him is illusory; and here the Master of the Rolls drew the line; so that any share which, squared by this rule, would exceed that amount, was not deemed illusory. But upon an appeal to the Lord Chancellor, in *Bax v. Whitbread*, for the express purpose of restoring the old rule, his Lordship thought that the principle stated in the late cases in effect destroyed all the authorities. The sum of 50*l.* being given, he said, in one family, and by one will, it is difficult to conceive that the identity of the sum, or the proportion, can afford the ground of determination in another family and upon another will. The motives also must be furnished by the same circumstances, whether good conduct or misconduct: a provision by a parent or a third person: circumstances, if the Court is at liberty to regard them, of utility. The result of the authorities, he added, was, that from the time of Lord Nottingham, the Court has taken upon [*585] itself the duty of exercising a discretion in these cases; and his Lordship seems to have considered himself still bound by those decisions. Upon a later appeal to Lord Eldon, in *Butcher*

(*g*) *Mocatta v. Lousada*, 12 Ves. jun. 123.

(*h*) *Dyke v. Sylvester*, 12 Ves. jun. 126.

v. Butcher, he expressed the same opinion. (i) The law, therefore, on this head, appears to stand as it did before the case of Butcher and Butcher was decided by the Master of the Rolls; and yet although Lord Eldon decided, that the Court was bound to inquire whether the share was substantial or not, his Lordship showed a strong disposition to narrow the doctrine. In both the appeals, the decrees of the Master of the Rolls were confirmed, on the ground that the shares were not illusory. In Butcher and Butcher, Elizabeth Butcher had a power to appoint the fund amongst her children by her present or any future husband, by deed or will, from time to time. The power was quite in the common form; and therefore, perhaps, much weight could not be given to the circumstance, that at the time of making any particular appointments she could not know what the number of objects would ultimately be; and, indeed, as appointments are not often made till the children require their portions, when the probability of many other children must have ceased, this is a difficulty which is not likely to arise. In default of appointment the fund was given in the usual way to sons at twenty-one, and to daughters at twenty-one or marriage; but it was provided, that if any son of her present marriage should attain twenty-one, or any daughter twenty-one, or marry, no child by any future husband should, by marriage or otherwise, be entitled to more than a moiety of the property, which provision, it might be contended, could not affect the right of each class of children, as between themselves, to a substantial share. She made the unequal appointment which has been mentioned; and Lord Eldon held, that attending to all the circumstances, and the nature of the trust collected from the deed, he was not authorized to say the share was not substantial. He relied upon the circumstances, that the power was from time to time, and the number of objects was incapable of being ascertained until she reached an age at which she could not have more; and if there had been one child by a subsequent marriage, after all her particular appointments, that child might have taken a moiety of what constituted the whole fund before any appointment, though that should leave to perhaps twenty children of the former marriage only their respective shares of what remained unappointed. It is evi-

(i) 1 Ves. & Bea. 79.

dent, he observed, how immensely large a 'discretion [*586] was given, and to what the fund might, by repeated executions of the power, be reduced, and this went far to show that her discretion must, as far as it can in any case, be unfettered.

7. As we shall hereafter see, what is not appointed, or is ill appointed, goes as in default of appointment, and where the fund was given by the instrument creating the power to the objects in default of appointment, the dying without any appointment as to a part was considered equal to an actual appointment; and therefore a sufficient share being permitted to descend was deemed tantamount to an appointment, so as to prevent any question of illusion. (*k*)

8. And if an appointment was made of part of the fund, excluding some of the objects, but leaving a share not illusory to descend, and afterwards an appointment was made of the residue, wholly excluding or giving an illusory share to some, the last appointment only was held to be void, so that the residue might descend and uphold the former appointment. If a contrary rule had been established, leaving a share not illusory to descend, would have been good at first, but have become bad afterwards. (*l*)

9. And although an appointment, abstractedly taken, were illusory, yet it might be justified by circumstances, and equity would not relieve against it. Formerly it was considered, that where but a trifle was given, yet if the child by misbehavior deserved it, the Court would not vary the appointment: (*m*) but ultimately it was held that the conduct of the objects of the power could not be taken into consideration. (*n*)

10. In *Boyle v. the Bishop of Peterborough*, Lord Thurlow laid it down, that where gross inequality is accounted for, and by the situation of the children, is rendered humane, and wise and discreet, the Court will not call it illusory. (*o*) Therefore, if a child become a bankrupt, and has not obtained his certificate, that may be a sufficient reason to give him a small share. (*p*) And where a father, having advanced a child upon marriage.

(*k*) *Wilson v. Piggott*, 2 Ves. jun. 351.

(*l*) *Ibid.* See 1 Ves. & Bea. 101.

(*m*) *Maddison v. Andrew*, 1 Ves. 57.

(*n*) *Kemp v. Kemp*, 5 Ves. jun. 855. See 1 Ves. & Bea. 97.

(*o*) 1 Ves. jun. 209; 3 Bro. C. C. 243.

(*p*) *Bax v. Whitbread*, 16 Ves. jun. 15.

recited that as a reason for giving her a small share, it [*587] was held not to be illusory.(q) For the *ground of interference in these cases is fraud, and in such case the *child* would be guilty of a fraud in attempting to set aside the appointment, the parent, perhaps, having advanced more on that account: the answer would be, he had given that child a substantive share, who therefore could not complain of the difference.(r) Lord Alvanley expressed his opinion, that, perhaps, if a sufficient reason *could be proved* between parent and child, the Court would apply the rule: but it must be proof, he said, that leaves no doubt whatsoever. And in speaking this, he adverted to extrinsic proof, where no statement appears upon the face of the appointment.(s) But it seems that in these cases the provision must have moved from the person entrusted with the power of appointment.(t) although in one case Lord Alvanley expressed an opinion, that a small share might be given where there is an actual provision made for some, *even where it does not more from the person creating the power*. The power of distribution, he said, was given in order that there might be an inequality, if necessary. It was therefore, he added, nothing but a trust in the party to discriminate how much each ought to have, under every circumstance that ought fairly to enter into his consideration, and with a view of the object of the power, that each of them should receive a provision. If that was satisfied *aliunde*, it had its object.(u) It is however clear that the provision must not have moved from the person *creating* the power.(x) And in a case, where, under a power to appoint to younger children, the parent, in effect, excluded the second son, because the eldest was an idiot, and he considered that the second child would obtain a grant of the surplus rents, which he actually did, yet Lord Redesdale held that the appointment was illusory.(y) His Lordship said, “if a

(q) *Bristow v. Warde*, 2 Ves. jun. 366; and see *Smith v. Lord Camelford*, ib. 698; *Vanderzee v. Aclom*, 4 Ves. jun. 771; *Long v. Long*, 5 Ves. jun. 445; *Spencer v. Spencer*, 5 Ves. jun. 362; *Bax v. Whitbread*, 16 Ves. jun. 15.

(r) See 5 Ves. jun. 368.

(s) *Spencer v. Spencer*, *ubi sup.* See 1 Ves. & Bea. 97.

(t) *Mocatta v. Lousada*, 12 Ves. jun. 123.

(u) *Vanderzee v. Aclom*, 4 Ves. jun. 785, *sed qu.* See 16 Ves. jun. 25; *Lysaght v. Royse*, 2 Scho. & Lef. 151; and 1 Ves. & Bea. 97.

(x) *Kemp v. Kemp*, 5 Ves. jun. 861; *Lysaght v. Royse*, *ubi sup.*

(y) *Lysaght v. Royse*, 2 Scho. & Lef. 151.

younger son is provided for amply by a fortune *aliunde*, by obtaining a lucrative situation, or the like, it may be a ground for an appointment so unequal that it might be otherwise deemed illusory; but that cannot be considered as a provision which is a mere expectancy, depending on the will and pleasure of another; *and an appointment cannot be deemed [*588] good or bad according to the manner in which that pleasure may be afterwards exercised. If a father supposed that provision would be made for one of his sons by his brother, which expectation might be finally disappointed, a very unequal appointment made under that expectation, however founded, and however reasonable at the time, could not be supported. In the present case, if the appointment had been made in such a form as would have given the son a fair share, in case he had not derived benefit from the peculiar circumstances of his elder brother, it might perhaps have been sustained; but this is an absolute appointment in all events, and the question is, whether such an absolute appointment, not subject to any contingency, can be made good by subsequent events, if it would not be good in all events. He thought the appointment must have been good on the day it was made, or not good at all. In cases of this kind, where the appointment is grossly unequal, and there is no just foundation for the inequality, but it is the result of mere caprice or mistake, the appointment cannot stand; it is not a just exercise of the power given. Here there was no caprice, no intentional injustice, but there was mistake, and the gross inequality was made under the influence of that mistake.

11. It may here again be observed, that if the fund consist partly of real and partly of personal estate, it is not necessary to give a part of each to every object; but if there are two, for instance, all the realty may be given to one, and all the personalty to the other.(z)

12. If the objects have agreed to abide by the intention and will of the donee of the power, they cannot set aside even an illusory appointment.(a)(I)

(z) *Morgan v. Surman*, 1 Taunt. 289.

(a) *Pawlet v. Pawlet*, 1 Wils. 224.

(I) This case, which is very long, did not decide any thing. The Earl made provisions by his will for all his children, and the decree is prefaced by this declaration:

[*589] *13. If the appointment is illusory, but there is by implication a gift to or a trust for the objects, the fund will be given to them equally.(b)

No. 20.

Daniel v. Goodwin.(c)

Exchequer, Trinity Term, 8 & 9 Geo. II.

THE husband, antecedent to the marriage, covenanted with his intended wife, that she should have a power to dispose by will of her estate and effects. Subsequent to the marriage, the wife was made executrix to the last will and testament of A. The wife afterwards made her will of the goods and effects she had as executrix; and constituted B. executor thereof. Upon a declaration in prohibition, and demurrer to the plea put in to it the question was, whether the Spiritual Court had a power to grant a probate thereof, or whether it should not operate as an appointment to be carried into execution by a Court of Equity! And as to this point, the Court took this difference, where the will subsisted upon the agreement of the parties antecedent to the marriage, there the will is in the nature of an appointment, which is to be carried into execution by a Court of Equity; but where the wife is made executrix to another person, there the Spiritual Court may grant a probate of her will, for she may continue the executorship by constituting a person executor to the first testator; and she may by law make a disposition of choses in action, which she was possessed of as executrix, because in *auter droit*;

that the plaintiff having by his bill, and now in court, expressly submitted to be bound by the intention of his father, the late Earl, in his deed of appointment and will, according to the true construction thereof, and all the defendants, the other children of the late Earl, having, by their answers, or now by their counsel at the bar, submitted to take, according to the true intention of the said Earl, and all the said parties disclaiming to take advantage of any defect in point of law or equity in the execution of the said Earl's power by the deed of appointment, his Lordship declared, &c. *Poulett v. Earl Poulett*, Reg. Lib. B. fol. 582.

(b) *Gibson v. Kinven*, 1 Vern. 66; *Kemp v. Kemp*, 5 Ves. jun. 849.

(c) *Vide supra*, vol. 2, p. 18.

and the Spiritual Court may prove such will ; 1 Mod. 201 ; Salk. 308 ; Vent. 4 ; 6 Mod. 241 ; 1 Roll. Abr. 608 ; Moor, 339 ; 2 Mod. 170.

No. 21.

Mansell v. Price.(d)

At the Rolls, Michaelmas Term, 9 Geo. II.

CATHERINE MANSELL, before her marriage with the defendant Price, assigned all her personal estate due to her by bond, judgment, &c. except 1,000*l.* which the defendant was to have immediately to his own use, in trust for the defendant Price, and Catherine his *intended wife, for their lives, and [*590] the life of the survivor of them, and afterwards that the principal money should be laid out in land to the use of the heirs of the body of Catherine by the defendant ; and for want of such issue, to the use of the survivor for ever, provided that Catherine should have power, at any time during the coverture, by will or deed, executed in the presence of three or more credible witnesses, to give or dispose of any sum out of the principal money, not exceeding 1,500*l.*, to such persons and uses as he should limit and appoint, which should be payable immediately after her decease, in case she died without issue by the defendant Price. Catherine Price, some time during the marriage, duly executed the power by deed-poll in the presence of three witnesses, and thereby, for the natural affection she bore to her niece Catherine Dawkins, and her eldest daughter Catherine, and for the next daughter her said niece should have, did give, grant, and dispose of the said sum of 1,500*l.* to Sir Edward Mansell, his executors and administrators, immediately after her decease, if she died without issue, in trust, that he should pay to Catherine, the eldest daughter of her niece, 1,000*l.* when she should attain the age of twenty-one, or marry, in case the marriage should be by consent of her mother ; but if she should die before twenty-one, or marry without consent, that then it should be to such uses as

(d) Vide *supra*, vol. 2, p. 20.

Catherine the niece, whether sole or covert, by deed or writing, should direct and appoint, except to her husband, if she should have any, with or without power of revocation; and the other 500*l.* she directed to be paid to the next daughter of her niece when she should be twenty-one, or marry, exactly under the same terms as before. Catherine, the niece, had afterwards issue another daughter, and then Catherine Price died without issue. This bill was filed by the guardian of the infant daughters, to have the money paid, and to be put out for them to have the interest thereof immediately. For the defendant Price it was insisted, that he was entitled to the interest of the 1,500*l.* until the same should respectively become payable, either as a resulting trust (he being administrator to his wife,) or part of his right under the articles taken from him by the execution of the power.

The first question was, whether parol evidence could be admitted to explain the intention of Catherine Price, what should become of the interest till the times of payment; for if that could be admitted, there was sufficient to prove the husband should not have it, but that it should go to the same persons to [*591] whom the money was given by the deed of appointment, and the Master of the Rolls was of opinion such parol evidence could not be read.

The second question was, whether there could be a resulting trust to the husband of the interest of 1,500*l.* till such time as it should become respectively payable according to the limitations in the deed.

As to this, he said this was not a case of a resulting trust, or a trust originally created, but it arose on a power given and executed out of an original trust, by which it must be considered as if it had never been comprised in that trust, because it was absolutely taken out of it by the execution of the power. This case of money differed from land where there was a complete disposition, for here was an entire and full disposition of the whole money; and it differed also in this respect, for land by law was always presumed to make a profit, and the form of all writs in real actions supposes it; but in the case of money it is otherwise, for it is not supposed to have any profit at all, and the time was when it was thought illegal to make a profit of money, and the canon law would not suffer an usurer to make a will. Then here

is a disposition of this money to Sir Edward Mansell, a trustee, by virtue of the power, who is not bound to put out his money, though he may be compelled, according to the judgment and direction of this Court; but of his own head he has no authority to put it out; and further, if a trustee, not having power, did put out money, it was at his own risk; and in that case, since he had practised, it had been thought that such trustee putting out money without the direction of the trust, or of the Court, should have the profit for the risk of putting it out; but now, if a trustee puts out money when not warranted by the trust, he must answer for ill security, and yet shall not have the benefit, because of late it had been easy and safe to lay out such money in government securities, which this Court thinks proper securities, having an act of parliament on its side. Then the whole capital money being in the hands of the trustee entirely for the benefit of *cestui que* trust, would draw the interest with it; so he decreed there would be no resulting trust on this power of appointment.

*No. 22.

[*592]

Williams and Others v. Carter and Others.(e)

By an indenture, bearing date the 9th of August 1802, and made between the Reverend Thomas Carter of the first part, Mary his wife (by her then name and description of Mary Proctor, spinster,) of the second part, and the Reverend Daniel Williams, clerk, Robert Philip Goodenough, clerk, Joseph Goodall, D.D. and William Carter, clerk, of the third part (being the settlement made previously to the marriage of the said Thomas Carter and Mary his wife,) the expectant share of the said Mary Carter of and in the sum of 5,000*l.* was assigned to the said trustees, upon trust to invest the same in real or government securities, or in the public funds, and to stand possessed of the same upon the trusts therein mentioned, for the benefit of the said Thomas Carter and Mary his wife, and their issue. And it was provided, "that it shall and may be lawful for the said Daniel Williams, Robert P.

(e) Vide *supra*, vol. 2, p. 459.

Goodenough, Joseph Goodall, and William Carter, and the survivors and survivor of them, his executors, administrators and assigns, in the mean time, after such investments shall be made as aforesaid, and until the trusts hereinbefore declared concerning the said stocks, funds and securities, shall be fully performed, with the consent in writing of the said Thomas Carter and Mary his wife, or the survivor of them, to change such stocks, funds and securities for others of the same or the like nature, as often as it shall be thought expedient, subject nevertheless to the trusts hereinbefore declared." And by the said Indenture the said Thomas Carter covenanted with the said trustees, "that if at any time or times thereafter during the said intended coverture, any hereditaments or real estate should descend unto, devolve upon, or become vested in possession, reversion, or remainder, in her the said Mary Proctor, or in the said Thomas Carter, in her right, then and in such case, and immediately after the same should happen, all and singular such hereditaments and real estate should be conveyed, settled, and assured upon and for the same trusts and purposes, and subject to the powers, provisoes and declarations as thereinbefore expressed and declared, concerning the said stocks, funds and securities, or as near thereto as the nature of real estate would admit of."

[*593] By indenture of Lease and Release, bearing date respectively the 18th and 19th March 1806, and a common recovery suffered, in pursuance of the said Indenture of Release, certain hereditaments and real estate were conveyed and limited to such uses as Henry Proctor, the father of the said Mary Carter, should appoint, and in default of appointment, to the use of all and every the daughter and daughters of the said Henry Proctor, as tenants in common, and the several and respective heirs and assigns of such daughter and daughters forever.

The said Henry Proctor died in January 1815, without having made any appointment of the said estates, leaving the said Mary Carter, Jane Proctor, and Emma Anne Proctor, his only daughters.

The said Thomas Carter, and Mary his wife, Jane Proctor, and Emma Anne Proctor, contracted to sell the said estates to which they became entitled under the Indentures of the 18th and 19th March 1806; and in February 1818 a bill was filed by the trustees of the marriage settlement, praying (among other things,) that

it might be declared that the plaintiffs were entitled to have the covenant contained in the said Indenture of settlement of 9th August 1802 specifically performed; and that the third part or share of the hereditaments and premises, to which the said Thomas Carter and Mary his wife, in her right, had succeeded, ought to stand settled to uses, or upon trusts, and subject to powers similar to or corresponding with the trusts and powers declared and expressed in the said Indenture of settlement, as nearly as the nature of the said third part or share would admit; and that it might be further declared that such powers ought to include powers of sale, and of partition and exchange over the said third part or share, with all necessary directions for giving effect thereto.

By a decree made on the 8th May 1818 it was declared that the share and interest of the defendant, Mary Carter, in the premises in question, were subject to the covenant contained in the settlement of 9th August 1802; and that the settlement to be made in pursuance of that covenant ought to contain powers of sale and exchange by the trustees, with such consent as is required for changing the securities, wherein the share in the 5,000*l.* mentioned in the settlement is invested.

*No. 23.

[*594]

Fox v. Gregg.(f)

DUCHY Court of Lancaster, before the Chancellor of the Duchy of the county Palatine of Lancaster, assisted by Mr. Justice Le Blanc and Mr. Justice Heath.

The facts were stated by Mr. Justice Le Blanc in giving judgment as follows :

This cause comes before the Court by appeal from the decree pronounced by the Vice-Chancellor of the county Palatine of Lancaster. The cause was originally instituted by Esther Marsland. The cause was revived by her executor, Adam Fox, and the decree of the Vice-Chancellor, by which it was brought to this

Court, declares the appointment by the testatrix, Mary Hamilton, of the moiety of the testator's estate to be illusory and void ; and that the moiety is to be applied in such manner as the will of the testator directs ; and it orders the moneys to be divided in eighteen proportions.

In order the better to understand the cause, I will shortly state the terms of the testator's will creating the power ; the appointment under the will, and some view of the facts produced from the prodigious mass of papers now before me. The facts are these :—Robert Hamilton, merchant, of Manchester, by will, duly made on the 11th July 1777, devised his real estate to be converted into money, and added to his personal estate, and directed the residue to be divided in two parts. He gave one moiety to Mary Hamilton his wife, for her own use and benefit, and the other moiety was to be put out at interest, and that interest to be paid her during her life. After her death, he directs, “ the same shall be paid to and divided among my cousins, viz. :—The children of my late uncles, Robert Hamilton and John Hamilton, and of my late aunt Mary Hobson, and my cousin Thomas Davenport, the children of my late uncle Edward Holt, and the grandchildren of my late uncle Robert Holt, deceased, in such shares and proportions, manner and form, as my said wife shall, by any her deed or deeds, writings, or by her last will and testament in writing, notwithstanding her coverture, to be by her duly executed in the presence of two or more witnesses, direct, order,

and appoint.”—Then come these words,—“ And in de-
[*595] fault of such direction, order, or appointment, I give and bequeath the same unto my said cousins, to be equally divided amongst them, *share and share alike* : and it is my will and mind that the child or children of such of my cousins as are now, or at the time of my decease, may be dead, or of such of them who shall die during the life of my said wife, shall stand in the place of their deceased parent or parents, and be entitled to such interest and benefit as the parent or parents of such child or children would have been entitled to by this my will, in case he or she had survived my said wife. And I nominate and appoint my said wife, and William Crane, executrix and executor of this my will.”—The facts which occurred after the will was made are these :—The testator, Robert Hamilton died the latter

end of 1780, or the beginning of 1781, without having revoked, or in any manner altered his will.

After his death, Robert Hamilton, who was his heir at law, and eldest son of Robert Hamilton, the deceased uncle of the testator, claimed to be entitled to and took possession of a copyhold estate situated at Sowerby, the property of the testator, because it was undisposed of, and had not been surrendered to the use it was to be applied to under the will. This, it must be observed, does not make any difference in the will, because if it was the intention of the testator to have this copyhold surrendered, it was to form a part of his general fund, therefore that circumstance may be laid out of the case.

On the 5th of May 1792, in the life-time of the testator's cousin Robert Hamilton, the testator's widow and executrix, Mary Hamilton, made a will properly attested:—In that will, after reciting the power given her by her deceased husband to divide and appoint one moiety of his personal estate amongst his cousins, in such shares and proportions as she should by deed or will, direct, limit, or appoint, she further adds, that Robert Hamilton, one of such cousins, being the eldest son of her late husband's uncle Robert Hamilton, had since his death claimed, and was then in possession of, a copyhold estate of which her said husband was seised in fee, and which he intended to devise by his will, but which did not pass thereby for want of having been surrendered to the use thereof; and that she therefore considered the said Robert Hamilton, the son, and his issue, as sufficiently provided for by such copyhold estate; and she, the said Mary Hamilton, declared her will, and directed and appointed the said moiety of the residue of her deceased husband's real and personal estate to be paid ^{and divided} [*596] as follows; that is to say, the sum of one shilling, (part thereof) be paid unto Robert Hamilton, the eldest son of her late husband's uncle Robert Hamilton, if he should be living, and if he should be dead, then to his issue, as and for and in full of his or his issue's share of the said moiety, and that the remainder of the moiety should be divided into so many and such shares and portions as the same would have been divided into under her said husband's will, in case the said Robert Hamilton, the son, had died without issue.

In 1794, after the making of this will, Robert Hamilton, the eldest son of the heir at law of the uncle of the testator, died, leaving issue four or more children, namely, Robert Hamilton, of Bramhall, in the county of Chester, farmer, his eldest son and heir at law; Ann Clark, of Bullock Smithy, in the said county, widow; Margaret Downing, wife of George Downing, of Marple, in the said county, and others.

In 1806, Mary, the widow and executrix of the testator, made a codicil, and after giving certain legacies "confirms her will in all respects, except as to the legacies hereby altered;" at the time of making this codicil Robert Hamilton was dead, but had left children.—She lived to 1810, and then died.

The case was argued at great length, by W. D. Evans, Duckworth and Lyon, Sugden, J. Williams, and Richards, for different parties.

It was admitted that the heir could not be put to his election, *Judd v. Pratt*, 15 Ves. 390. *Evans*, in support of the appeal, insisted that the appointment by the will was valid at law, and the equitable doctrine did not apply in this case, because the appointee of the illusory share died in the life-time of the testatrix. Illusory appointments have only been relieved against at the suit of parties deluded. The original equity is personal. The doctrine ought not to be extended, for it is against the intention. The rule requires a fair distribution. The general doctrine has been confined by the late cases, *Spencer v. Spencer*, 5 Ves. 362; *Butcher v. Butcher*, 9 Ves. 381, 16 Ves. 15. The doctrine does not prevail where there is a provision *aliunde*. This shows the personal nature of the equity. But at all events, the subsequent codicil made good the will. On Robert's death, she might exclude him, his children and representatives. She could not have made an appointment in his favour. The codicil is executed by two witnesses.

Sugden, contra, contended that the power did not authorize an exclusive appointment, *Kemp v. Kemp*, 5 Ves. 849, [*597] and that Robert was not sufficiently provided for so as to authorize the widow to exclude him in effect, 5 Ves. 861; 2 Scho. and Lef. 151; 1 Ves. and Bea. 97. The appointment, therefore, by the will, was illusory and void, and the codicil did not give effect to it as a new will, or operate as an appoint-

ment, *Holmes v. Coghill*, 7 Ves. 499, 12 Ves. 206; *Lane v. Wilkins*, 10 East, 241; *Hamilton v. Royse*, 2 Scho. and Lef. 315; *Cadogan v. Sloane*, App. No. 24, to 6th edit. of Sugd. on Purch. The will must stand as it did at the time of making it. For. 26.

Mr. Justice Le Blanc (after having taken time to consider) pronounced the following judgment :

It was fully admitted by counsel for the Appellant that the appointment of the moiety in the will of Mary Hamilton could not be supported, inasmuch as it gave *one shilling* only to Robert Hamilton, one of the cousins of the testator; and whatever doubts may have arisen in a court of equity, as to what is to be considered a proper appointment of this moiety under the will of the testator, there can be no doubt that the appointment in this will executed by Mary, wife of the testator, was the same as no appointment at all; but then it was contended that the person to whom this residuary bequest had been made was to be considered as not existing at the time her codicil was made; and if he was not to be considered in existence, none of the parties could take advantage of the will as if he had been living when the codicil was made. It was further contended, that this codicil of 1806 operated as a new deed. Robert Hamilton was dead, and taking that to be so, no appointment could be made to him, because he was out of the way. Now, whatever weight this might carry, under a supposition that Robert Hamilton had left no issue, it appears to us that his having left issue is an answer to this objection, and sufficient to decide the present question before the Court. It is observed, that the original testator, Robert Hamilton, considers to whom he will give this moiety, and his mind is obviously bent on the persons: he describes them as his cousins, and then he particularizes the stock from which his cousins spring: namely, the children of his late uncles, Robert Hamilton and John Hamilton, and of his aunt Mary Hobson. In addition to those, he mentions his cousin Thomas Davenport, the children of his uncle Edward Holt, and the grandchildren of his uncle Robert Holt, which shows he meant his cousins once removed, and that he had no intention to convert his estate to the use of the children of uncles and aunts farther removed; *and [*598] when he states that it is for such children who stand

in the place of their parent or parents deceased, it clearly proves that it was his will, at all events, the children should stand in the place of their parents, as to any benefit the deceased cousins were to derive under this will; and it is clear that in case an appointment had been made, the benefit was to be derived by those persons. The interest of this moiety being by her to be disposed of according to her husband's will, could it be said that she had the power to apply it differently, and create a new interest after her death? The testator has clearly distinguished the persons to be benefited, by directing it to go in a regular line, namely among those whom he considers the children of his uncles, and it is clear to me that he was contemplating, at the time he made his will, the death of those who might die, and the interest of those who might outlive them. If his wife, at whose death the appointment could not take place, knew the way this interest would apply, and appointed it to go contrary to the will of the testator, of course it decides the question; for in that case will the appointment be looked at, or will her codicil, by which she confirmed her appointment, be valid? It cannot be valid, inasmuch as it has appointed this moiety while there were others in existence to whom some appointment ought to have been made, and to whom none was made, *videlicet*, Robert Hamilton and his issue. There were his children, who ought to stand in his place, and have such appointment of shares as a court of equity might limit. I have considered this question; and my opinion is, that the object of the testator's will was to give this moiety to his cousins, and that his putting the children in the situation of the parent or parents is a clear definition of his will: such we think was the intention of the testator; his object was to put the children in the situation of the parent in respect to this moiety, and it matters not how the will gives the power of appointment to the widow. Could it be contended, if all the cousins had died in her life-time, and had left children, the wife's power of appointment would have enabled her to appoint to one child in exclusion of the whole, especially after the testator had selected the children of his uncles and aunt to be objects of his bounty? Supposing that all the children of his uncle should be dead, the testator, at the time of making his will, directs that the child or children of his cousins deceased, either at the time of making his will, or who may die during the life of

his wife, shall be entitled to such interest or benefit as the parent or parents would have been entitled to in case they had survived his wife. He describes *Robert Hamilton, [*599] John Hamilton, and Edward Holt, his uncles, and Mary Hobson, his aunt, as the stock which is to be benefited, and the descendants of those persons were to receive benefit in the appointment of the moiety by the widow. For this reason it appears to me that the appointment in the will of Mary Hamilton is invalid; and therefore the fund becomes applicable to the use of the will of the testator. I therefore shall submit to the Chancellor of the Duchy, that the decree of the Vice-Chancellor, declaring the appointment by the testatrix illusory and void, should be affirmed, and the costs of all the parties paid out of the fund: and the decree of the Vice-chancellor was accordingly affirmed.

No. 24.

Observations on Hills v. Downton.(g)

“THE ground of my determination seems to have been misunderstood. I was of opinion in *Chapman v. Gibson*, that the heirs being persons for whom the testator was under no natural or moral obligation to provide, there was no occasion to inquire whether the heirs were provided for or not. I did indeed say, in that case, they having parents alive whose circumstances did not appear, they could not be presumed to be wholly unprovided for. I found it so often laid down, that the Court would supply the want of a surrender against an heir, if he was not wholly unprovided for, and so many *dicta*, that if he was in that situation the Court would not compel him to surrender, that I thought it proper to enter rather largely into the consideration of the principles upon which the Court acted in supplying surrenders; and I collected the principle to be this, that the heir shall be compelled to make good the disposition of his ancestor, if made in discharge of a moral or natural obligation, as in favour of creditors, wife and children; but still they had not done it where the heir, being a

(g) Vide *supra*, vol. 2, p. 109.

son, could show, that if he was compelled to make that surrender, the consequence would be (he being a son wholly unprovided for,) that he would be compelled to fulfil the intentions of his father in discharge of a moral or natural obligation in favour of a widow, or of his brothers and sisters, when it was manifest that he had neglected to discharge the natural obligation he was under of providing for him, his eldest son. I admit that it had [*600] been laid *down, that the Court would not enter into the *quantum* of provision, of which it is declared the father is the proper judge: and feeling all the difficulties arising from the exception so often made to the rule of an heir wholly unprovided for, I shall be very glad to find that for the future the Court may be at liberty to get over this exception to the rule. But if the case of a son wholly unprovided for were to come before me, I should hesitate, notwithstanding the great authority of the Lord Chancellor, to make a decree against him; and was very glad to be relieved, in the case of *Chapman v. Gibson*, from the necessity of deciding upon that point, it being perfectly clear that the principle could not apply to the case of a collateral heir, for whom the testator was not under any obligation to provide.

“R. P. A.”

No. 25.

Leach v. Campbell.

Reg. Lib. A. 1773, fol. 698.(h)

The power of leasing is stated correctly in *Ambler*.

THE original bill stated, that Leach pretended that by Indenture, dated 10th March, 1759, Pryce Campbell, in consideration of former covenants, and for other considerations did demise and grant to Leach all the mines, veins, pits, groves, rakes, beds, and holes of lead, lead ore, and all other mines, which were or should at any time during the demise be found out in or under the lands,

with full license to open pits, &c., and work the mines and to make drains, &c. with right of way to carry away the ore, and liberty to build forges, &c. To hold from 25th March, 1759, for 26 years, paying unto Pryce Campbell, his heirs and assigns, during the continuance of the demise, the eighth tondish of all the lead, &c., which should be got ; the lessee to cleanse and deliver the same on the banks every three months, or oftener if required. That the defendant insisted the lease was good under the power : But the plaintiff submitted that the lease was absolutely void, not being authorized by the power ; but that such power was intended to extend to messuages or lands only, and not to mines, as appeared from the condition of the said power, that there should not be contained in any lease any clause whereby any power should be given to any lessee to commit waste, which condition could not be complied with in a lease of mines, a restraint from commission of waste being totally inconsistent and [*601] contradictory to a lease of mines ; and the plaintiff also submitted, that if the power should be construed to extend to mines, yet the lease was not within the power : for the lease being made for 26 years, was made for a longer term than the power authorized, which was only 21 years. And that the lease being dated the 18th of March, 1759, and it being expressed Leach should enjoy the premises from the 25th of that month, the same was in reversion, whereas the power declared that the leases should be in possession only. And that the reserved rent was not thereby made incident to the reversion of the premises, as was required by the terms of the power, but was made payable to Campbell, his heirs and assigns. And also that such rent was not a yearly rent, nor was it the most improved rent which at the time of the lease could be got for the mines. The rent ought to have been a fourth instead of the eighth ; in corroboration of which the produce of the mines was stated ; and it was insisted that Leach deceived Campbell, the lessor, who relied on his information.

• The answer admitted the lease to be in effect as stated. Leach stated that he had opened no new mines since the death of Campbell, or the making of the lease ; he insisted upon his right to the open mines at the time of the lease, which had been worked by him since 1743, under a lease for 21 years, at a great expense.

And he submitted that the parties intended the power to extend to mines, as the mines were at the time of the marriage, and many years before, in his possession.

He stated, that he being in possession of a lease for 21 years, commencing on the 8th June 1753, ending in June 1764, P. Campbell agreed to add twenty-one years to his term. By the lease for 26 years, the term of 21 years, within a few months, was added to the then subsisting term.

He insisted that the rent was incident to the reversion; that the reservation quarterly, or oftener, was more beneficial than being reserved yearly, and that the rent was the best that could be got. That after the lease of 1759, and with a view to his enjoying for 26 years, he laid out large sums in making levels, &c. from several of which he had yet received no advantage, although between the 25th of March 1759, and the 15th of June 1771, he had paid above 33,000*l.* in making and repairing the works.

He likewise stated, that in 1763 he agreed to erect smelting works upon the waste lands of Pryce Campbell near the [*602] mines; and made proposals *to Campbell for taking a longer term in them than in the mines, or that a compensation should be made for them at the end of the lease of the mines. P. Campbell, after considering the proposals, did by letters to the defendant in 1763, declare that he would by all means have the works go on; and that as he should not grant any lease of that for a longer term than the mines, it was but reasonable that a sum should be agreed upon to be paid to the defendant upon the expiration of the said term, the works being left in good repair, and the tools to be bought by appraisement; and that if the mill was left in perfect good repair, he (P. Campbell) should think what the defendant demanded (half of the sum laid out in building it) not at all unreasonable, and that the defendant would always find him very ready to do what he thought was so. And P. Campbell intimated his intention of becoming a partner, which he afterwards declined. That in consequence of the lease, and letters of agreement, the works were erected; but a regular agreement was omitted to be executed until 1768, when P. Campbell, informed the defendant that he would have articles drawn relating to the works: but he died in that year, without having executed any.

The answer insisted upon the lessee's right to the enjoyment of

the term, at least during the residue of 21 years from the making of the lease.

The Master of the Rolls made the order stated in Ambler. Then a cross-bill was filed by Leach for establishing the lease and agreement. The Master of the Rolls directed the account prayed by the original bill, and dismissed the last bill.

I met with an order for the hearing on the appeal, but could not discover the decree on the appeal, or any subsequent proceedings, although I searched with attention to the end of the year 1777, for the original as well as the cross-case.

No. 26.

Lane v. Terry.

Reg. Lib. B. 1753, fol. 527.(i)

It was charged by the bill, that it was previously to the marriage agreed that the wife should not have the benefit of the jointure ; and that Terry, in trust for whom it was executed, threatened to throw Simon into prison if he refused to come into the measure ; That Simon "labored under a mortal [*603] disease, of which he soon after died, and was greatly impaired in his senses as well as his health, and in that situation Terry prevailed on him to marry Ann, *with whom he never cohabited* ; and the plaintiff submitted, that the intention of the power was to make a handsome provision for the donee's wife, and thereby enable him to marry one of circumstances suitable to his own and not by colour of such jointure to pay his own debts, to which the premises were not liable, whereas the jointure set up was in fact a settlement on Terry.

It was decreed, " that the settlements by deeds of lease and release, and the paper writing intituled, Proposals upon executing the Marriage Deed, were to be considered as one entire agreement ; and that the said agreement and settlement ought to be deemed in this Court fraudulent and void, except as to the annual sum of 20*l.*, provided for the benefit of Ann Lane during her

(i) Vide *supra*, vol. 2, p. 185.

life; and it was ordered and decreed that the same should be set aside, except as to the said annual sum of 20*l*."

Note.—The wife conveyed to Terry, after the death of her husband, upon the trusts, as stated in Ambler.

No. 27.

Aleyn v. Belchier.(*k*)

Reg. Lib. A. 1757, fol. 432 (B).

THE estate in question was devised to trustees in fee, to raise money by mortgage, and to uses, under which Edmund Aleyn was tenant for life, "with power to him to make a jointure of the manors, lands and premises aforesaid, or any part thereof, upon any wife whom he should after think fit to marry, for her life, and in bar of her dower."

The trustees under a decree mortgaged to Belchier in fee.

Edmund Aleyn, shortly after his marriage, without any previous agreement, proposed to make a provision for his wife; and being then indebted to Belchier, by an agreement bearing date the 1st day of August, 1750, and made between Aleyn and his wife of the one part, and Belchier of the other, reciting the matters aforesaid, and that Aleyn was indebted to Belchier in a certain sum; it was witnessed, that in full satisfaction of [*604] that sum Aleyn covenanted to procure a *conveyance and settlement to be made by the trustees of the estates devised to them, to the uses, &c. in the will; and immediately after such settlement, to limit the same to his wife for her life, in case she should survive him. for her jointure; and that he and his wife, as soon as they should become seised of the said estates for their lives, would by fine &c. convey the same to the use of Belchier, or as he should appoint, for the lives of Aleyn and his wife, and the survivor of them: in consideration whereof Belchier covenanted to pay the following annuities, &c.; viz. to the

(*k*) Vide *supra*, vol. 2, p. 185. 303.

wife, for the joint lives of her and her husband, an annuity of 60*l.* for her separate use ; an annuity of 60*l.* per annum to Aleyn, if he should survive his wife ; and 100*l.* a year to the wife if she should survive him ; and to the wife's son by a former husband, 100 guineas at twenty-one, and 5*l.* a year in the meantime for maintenance. A settlement was afterwards executed by the trustees, and Aleyn limited the estates to his wife for her life under the power, subject to the mortgage made by the trustees to Belchier, and afterwards Aleyn and his wife conveyed their life-estates by a fine to a trustee for Belchier. Belchier insisted that the settlement was a good and effectual settlement, and was made upon a good and valuable consideration, and was not void, and that he was entitled to the benefit of it.

The remainder-man stated that he was advised, that in case the power of jointuring was executed by Edmund Aleyn, for any other purpose than for a fair jointure for his wife, such execution was contrary to the intention of the testator, and a fraud upon the remainder-man.

It was decreed, " that the deed of appointment was not to be supported in this Court any further than to charge the premises with the annual sum of 100*l.*, agreed to be paid by the deed of 1st August to Jane Aleyn, the wife of Edmund ;" and directions were given accordingly.

No. 28.

Read v. Shaw, 1807.(1)

POWER to trustees to sell or exchange in the usual manner ; Money to be invested in the purchase of other messuages, tenements or hereditaments, to be conveyed to the same uses. The trustees in exercise of the power conveyed the estate to a purchaser, in consideration of 1,700*l.* And the [*605] purchaser, in consideration of the like sum, granted to the trustee a perpetual annuity of 73*l.* 16*s.* out of the estate, to the use of the settlement ; and he covenanted to lay out 3,000*l.*

(1) Vide *supra*, vol. 2, p. 488.

in building on the estate. The purchaser afterwards sold, and filed a bill to enforce the purchaser from him to complete the contract. And on the coming on of the cause the title was, without argument, referred to the Master; and by his report, after stating deeds of the 5th and 6th October, 1780, the 1st and 2d February, 1796, and the 3d and 4th February, 1796, and the 14th and 15th March, 1796, and the 21st and 22d March, 1796, the Master finds, by a case stated for the opinion of counsel on the part of the plaintiffs, of which the defendants have notice, and the deeds of the 14th and 15th days of March, 1796, and of the 21st and 22d days of the same month, were merely formal, executed under the advice of counsel, for the purpose of apparently complying with the requisites of the aforesaid power of sale contained in the marriage settlement of the 6th day of October, 1780, but that the real contract between the vendors and the purchasers in that transaction was a sale of the freehold premises in consideration of the aforesaid rent-charge issuing out of the same premises only with the aforesaid covenant, to lay out the said sum of 3,000*l.* in improving the same; and he was of opinion that such transaction was not a due execution of the power to sell, or of the power to exchange, contained in the aforesaid marriage settlement, for which reason he certified that the plaintiffs could not make a good title to the freehold part of the premises in question.

Exceptions were taken to this report, but they were never argued, and the plaintiffs consented to rescind the contract, and to pay the purchaser's costs.

No. 29.

Pope v. Whitcombe.

Reg. Lib. B. 1809, fol. 1535.(*m*)

BILL filed, by W. Pope, executor of Mary Childe, for an account of personal testator and testatrix (the Childes) then remaining unadministered. That the funeral expenses, debts, and

(*m*) Vide *supra*, vol. 2, p. 247. 251.

legacies might be paid in a due course of administration ; that the clear residue of *testator's* personal estate might be ascertained, and might be applied and paid to the several persons entitled thereto under will of testator.

*States the will of Mary Childe, 27 May, 1799 ; taking [*606] notice that she had the disposal and appointment of her husband's property amongst his relations, (her son, James Childe, being dead ;) devises the freeholds and leaseholds to John Whitcombe and his sister, Elizabeth Hawford, their heirs, &c. as tenants in common. Residue of the estate and effects of testator she gave as follows : 20*l.* to John Whitcombe, remainder to John Whitcombe, his executors and administrators, upon trust for Elizabeth Hawford for her separate use for life, after her decease upon trust, as to one moiety, for John Whitcombe, of Gosport, the other to the issue of Elizabeth Hawford, as therein mentioned. The decree was for an account of the personal estate of John Childe, the testator, that what should be found due from testatrix, Mary Childe, should be a debt from her estate ; that testator's personal estate should be applied in payment of debts, &c. An account of personal estate of Mary Childe. Master to inquire who were the next of kin of testator living at the time of his death, and at the death of testatrix, Mary Childe ; and if any dead, when they died, and also personal representatives ; and whether John Whitcombe, William Hawford, and Elizabeth his wife, and Elizabeth Hawford and Sophia Hawford (residuary legatees under will of Mary) were in any, and what degree, related to testator.

1808, May 17, Master's report stated the result of the accounts, and the will of the testator, 1784, March 22, shortly. As to inquiry as to next of kin, &c. the Master found that the late defendant John Childe and Thomas Whitcombe, since deceased, (who was the father of the defendants, Thomas Whitcombe, George Whitcombe, Charles Whitcombe, Ann Watts, Elizabeth Hawford, and Mark Antony Whitcombe) and John Whitcombe, were the only next of kin of the said testator, James Childe, living at the time of his decease ; the said John Childe having been the testator's brother of the half-blood, and the said Thomas Whitcombe, since deceased, and John Whitcombe, having been the nephews of the said testator, and the children of Elizabeth, wife of John Whitcombe, a deceased sister of the said testator ; and he found

that the said testator's said nephews, Thomas Whitcombe and John Whitcombe, both died in the life-time of the said testatrix, Mary Childe; and that the late defendant, John Childe, was the only next of kin of the said testator living at the decease of the testatrix, which happened 11th April, 1800.

He found that neither the defendant, John Whitcombe, nor the late defendant, William Hawford, were in any degree [*607] related to the said testator; but he found that the defendant, Elizabeth, then the widow of the late defendant, William Hawford, was the great niece of the said testator, James Childe, and the other defendants, Elizabeth Hawford and Sophia Hawford, were the great-nieces of the testator James Childe.

1809, June 19. Order of Master of Rolls on further directions. It is ordered that the Master do tax the costs; that the $\text{£}15\text{ }8\text{ }6\text{d}$. Bank 3 per cent. annuities, standing in the name of the Accountant-general in trust, in this cause, to the credit of the personal estate of the testator, James Childe, be sold, to be paid into the Bank. It is ordered that the costs, as therein mentioned be paid: that the several sums mentioned in the fifth schedule to the Master's report, reported due for the legacies given by the will of the testator, and interest be paid to such legatees, and that the residue thereof be paid to the defendants, Science Childe and Eleanor Robinson Childe, as the personal representatives of John Childe, the next of kin of the said testator.

Declare that the will of the testatrix is not a valid appointment of the residuary estate and effects of the said testator.

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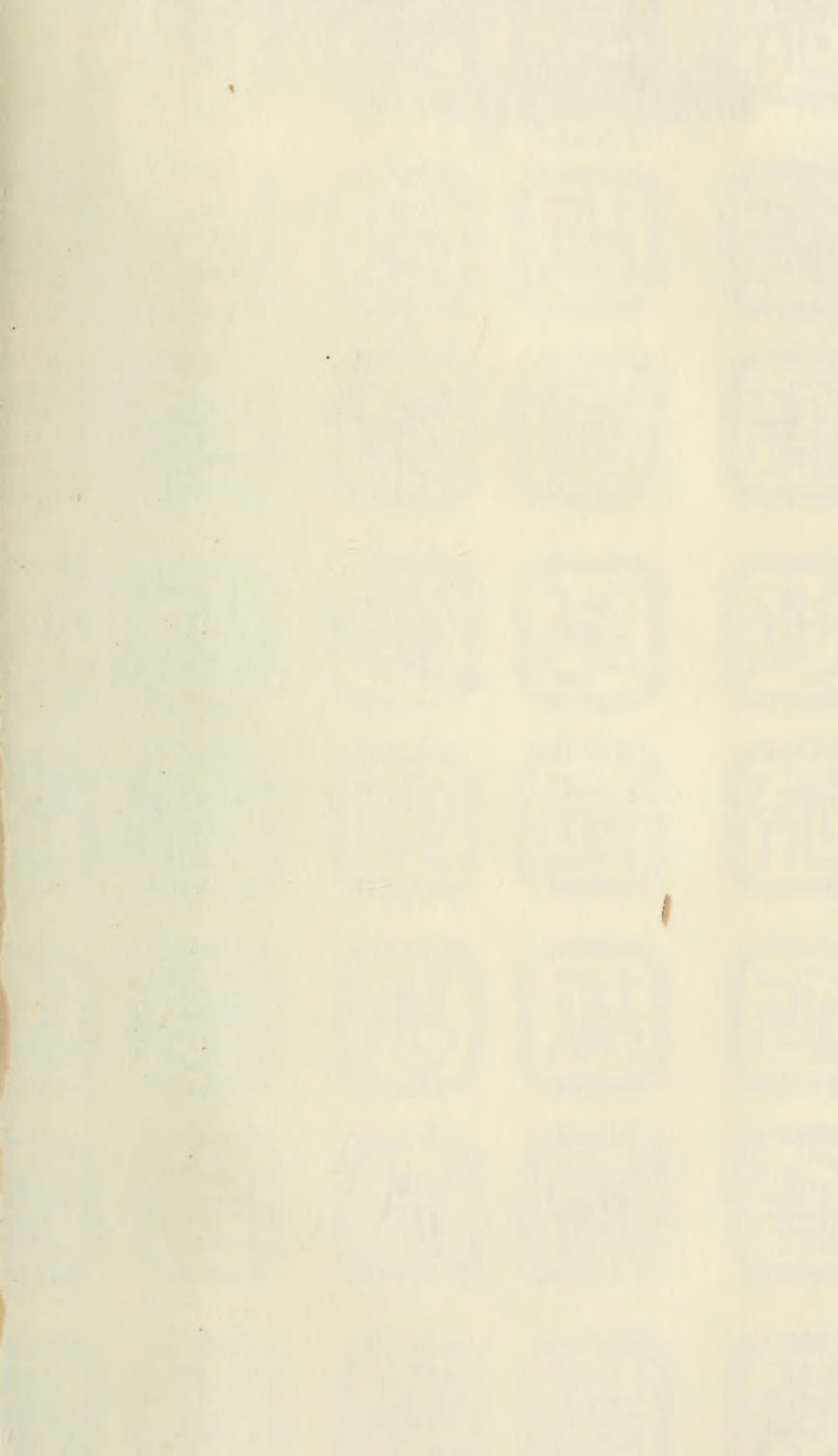
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